134-530

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 227.

BROWN, BONNELL & COMPANY, APPELLANTS,

vs.

THE LAKE SUPERIOR IRON COMPANY, THE JACKSON IRON COMPANY, AND THE IMPORTERS' AND TRADERS' NATIONAL BANK OF THE CITY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 20, 1886.

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1 Circuit Court of the United States, Northern District of Ohio, Eastern Division.

To the honorable judges of the circuit court of said district and division:

The Lake Superior Iron Company, a corporation duly incorporated under and by virtue of the laws of the State of Michigan and a citizen of said State of Michigan; Jackson Iron Company, a corporation duly incorporated under and by virtue of the laws of the State of Michigan and a citizen of said State of Michigan, and the Negaunee Concentrating Company, a corporation incorporated under the laws of the State of New York and a citizen of the said State of New York, bring this their bill of complaint against Brown, Bonnell & Company, a corporation duly incorporated under and by virtue of the laws of the State of Ohio and a citizen of said State of Ohio; and thereupon your orators complain and say that they are, respectively, creditors in large amounts of said defendant corporation—that is to say, the said defendant corporation is indebted to the Lake Superior Iron Company in the sum of thirteen thousand seven hundred and seventy-six dollars and seventy-five one-hundredths, such indebtedness being evidenced by three promissory notes, executed and delivered to the said Lake Superior Iron Company by said defendant, each of the amount — four thousand five hundred and ninety-two and twenty-five one-hundredths dollars, said notes dated, respectively, October twentieth, eighteen eighty-two; November 20th, 1882, and December 20th, 1882, each payable in four months from the date thereof. The said defendant is indebted to the said Jackson

2 Iron Company in the sum of $14,723.80, such indebtedness being evidenced by two promissory notes of $7,361.90 each, and dated December 7th, 1882, and payable in three and four months from date; and the said defendant is indebted to the Negaunee Concentrating Company in the amount of $5,110.40, which said indebtedness is evidenced by a judgment against said defendant, dated February 20th, A. D. 1883, rendered in said circuit court.

And your orators, further complaining, not only in their own behalf but in behalf of all other creditors of said defendant, whom it is impossible to make parties to this bill of complaint on account of the great number, say that said defendant corporation is insolvent; that said defendant has for a long time been engaged in the business of manufacturing iron, and in such business have erected blast furnaces, rolling mills, coke works, and opened and operated coal mines; that the plant of said corporation has been and is of great value; that the good will of said plant and business of said defendant has been and are of great value; and your orator further says that said defendant now employs operatives in their said mills and works to the number of at least four thousand; and your orators further say that vexatious litigation has been commenced against the said defendant and many more such are threatened, and that such litigations are accompanied by attachments and seizures of property, and such threatened litigations will also be accompanied

by attachments and seizures, and that such attachments and seizures will give to those creditors who are pursuing them undue and unfair advantage and priority over your complainants, whose
3 claims are not yet due, and make them irreparable injury and damage; that if such litigations be further instituted and its property seized in attachment as it already has been there is great danger that the valuable property of the defendant will be irreparably injured and to a great extent destroyed, and your orators say that such seizures and interference with the business and the property of the defendant would wholly destroy the value of the good will of the company as an asset and wholly break up its long-established business, and thereby cause detriment and irreparable injury to your orators and all other creditors.

And your orators further say that unless this court shall interfere and protect and preserve the property and assets of said defendant by putting it into the hands of a receiver the said property will be in great danger of destruction and dissipation by the large number of operatives who would necessarily be discharged and left without work or means of obtaining it, and such operatives, by reason of the great distrust they already have and on account of a fear that they will not in future receive remuneration, will abandon their employment and thereby cause a stoppage of the extensive business of said defendant to the extent that the creditors of said defendant would not be able to realize one-half of the amount upon the several claims that they would if the said business of the defendant were continued.

And your orators therefore pray process of subpœna against said Brown, Bonnell & Company that it may make answer to all the matters and things set forth in this bill of complaint, and
4 that a proper person may be appointed by and under the decree and direction of this honorable court to take charge of the property and assets of said defendant, and for such other and further relief in the premises as to your honors shall seem meet.

(Signed) M. R. KEITH AND
F. J. WING,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division:

Personally appeared Harvey H. Brown, who, being duly sworn, says that he is the duly authorized agent of the complainants in the above bill of complaint, and further says that the allegations of said bill are true.

(Signed) HARVEY H. BROWN.

Sworn to and subscribed in my presence by the said Harvey H. Brown on this 20th day of February, A. D. 1883.

(Signed) A. J. RICKS,
Clerk, etc.

5 [Endorsed:] No. 4195. Lake Superior Iron Co. *et al. vs.* Brown, Bonnell & Company. Bill in equity. Filed Feb. 20, 1883. A. J. Ricks, clerk U. S. circuit court. M. R. Keith, F. J. Wing, sol'rs for compl'ts.

6 United States Circuit Court, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL AND COMPANY.

To the honorable the judges of the circuit court of the United States in and for said district and division:

The said complainants, humbly complaining, as they have hereinbefore complained, in their own behalf, and also in behalf of all other creditors of the defendant secured or unsecured, file this their supplemental bill of complaint, ahd show unto your honors, as it was shown in part of [by] the original bill filed herein, that the property of the defendant to which resort must be had by its creditors is of such a peculiar nature that great and irreparable loss, hindrance, and unjust preference between creditors would be experienced by your complainants and all other creditors in the collection of their several claims unless such property of the said defendant should be preserved in its entirety as a business by the receiver heretofore appointed by this court, during the necessary time required to liquidate and adjust the affairs of said defendant company.

And your orators further show unto your honors that The Negaunee Concentrating Company, one of the original complainants named, had recovered a judgment against the said defendant
7 prior to the filing of said original bill, and that such recovery of judgment gave to said Negaunee Concentrating Company a lien upon all the real estate of said defendant situate within the jurisdiction of this court, which lien still exists; and your orators further show that since the filing of the original bill herein execution has been issued upon said judgment in favor of the Negaunee Concentrating Company, and that the same has been returned unsatisfied; and your orators further show, upon information and belief, that other claims for liens and priorities of payment are made or threatened to be made by certain creditors of the defendant against its property, and also show that the creditors of said defendant, both secured and unsecured, are very numerous, and that there are many claims made against said defendant the justice of which is doubtful, and that many apparently just claims are unliquidated and not properly ascertained in their amounts; and your orators further show that there are stockholders of said defendant corporation some of whom reside within the jurisdiction of this court and are citizens of the State of Ohio, to wit: A. W. Jones, Charles A. Otis, F. H. Mathews, Amasa Stone, W. H. Harris, Dan. P. Eells, Mrs. Eliza Witt, Howard P. Eells, John I. Williams, George M. Ayer, Mrs. Amy G. Ayer, H. I. Higgins, Maria Louisa Ayer,

Mrs. H. C. Ayer, A. M. Withend, D. P. Eells, trustee, Mrs. Paige E. Newberry, Mrs. E. A. Copeland, Harriet L. Ayer, J. C. Knickerbocker, R. J. Wick, Lewis Lake, H. C. Ayer, F. B. Williams.

Wherefore your orators, praying as they have heretofore prayed in the original bill filed herein, in addition thereto pray that the said A. W. Jones, Charles A. Otis, F. H. Mathews, Amasa
8 Stone, W. H. Harris, Dan. P. Eells, Mrs. Eliza Witt, Howard P. Eells, John I. Williams, George M. Ayer, Mrs. Amy G. Ayer, H. I. Higgins, Maria Louisa Ayer, Mrs. H. C. Ayer, A. M. Withend, D. P. Eells, trustee, Mrs. Paige E. Newberry, Mrs. L. A. Copeland, Harriet L. Ayer, J. C. Knickerbocker, R. J. Wick, Lewis Lake, H. C. Ayer, F. B. Williams may be made parties to this suit by the proper issuance of subpœna from this court.

And that a special master be appointed by this court to ascertain the priorities of liens upon the property of said defendant and to adjust and determine the rights of claimants whose claims shall be disallowed by the receiver heretofore appointed, and that such master may be ordered to report his findings to this court.

And that the receiver heretofore appointed be directed to send a copy of the decree herein granted in this behalf, if one shall be granted, to every known creditor of said defendant or person who claims to be a creditor, and that he shall notify all such creditors or claimants, by due course of mail, after the entry of this decree, that if they wish to participate in the benefits of any decree of this court arising in this cause or if they wish to have applied to the payment of their claims any portion of the funds arising from the sale of the property of said defendant or any other order granted with respect to said property by this court, they shall present their claim, duly verified, to the receiver heretofore appointed herein, for allowance, on or before a day to be fixed by the court in its decree.

And your orators pray that at the final hearing of this cause your honors will order the receiver herein to sell all the prop-
9 erty of the defendant company, and that such receiver shall hold the proceeds subject to the further order of the court, and that said receiver be directed to enforce the individual liability of the stockholders of said defendant corporation in behalf of all creditors of the same, if it shall appear that after the exhaustion of all assets there are any claims or parts of claims remaining unpaid, and for such other and further relief as to the court shall seem just and proper.

(Signed) FRANCIS J. WING,
M. R. KEITH,
Solicitors for Compl'ts.

10 STATE OF OHIO, }
Cuyahoga County, } *ss:*

Personally appeared Harvey H. Brown, who, being duly sworn, says that he is the duly authorized agent of the Negaunee Concentrating Company, and that the allegations of the foregoing supplemental bill are true.

(Signed) HARVEY H. BROWN.

Sworn to before me and subscribed in my presence this 28th day of March, A. D. 1883.

[SEAL.] (Signed) J. B. FAY,
Notary Public.

11 [Endorsed:] 4195. U. S. circuit court. The Lake Superior Iron Company *et al. vs.* Brown, Bonnell and Company. Supplemental bill. Filed Mar. 28, 1883. A. J. Ricks, clerk U. S. circuit court. F. J. Wing, M. R. Keith, solicitors for complainants.

12 Circuit Court of the United States, Northern District of Ohio.

TUESDAY, *February 20th*, 1883.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } No. 4195. Chancery.

This cause came on to be heard upon the bill filed herein, and the defendant, by its counsel, having entered its appearance and waived service of notice; and thereupon came on to be heard the complainants' motion for the appointment for a receiver of the defendant company, its property and assets of every kind; and thereupon, upon consideration, it is ordered that Fayette Brown be, and he is hereby, appointed a receiver of the defendant company in this cause, and, upon giving bond in the sum of one hundred thousand dollars for the faithful performance of his duties as such receiver, with surety approved by this court or the clerk thereof, he shall have power to enter upon and take possession of the money and assets, real and personal, and generally all the rights and property of said defendant of whatsoever name and nature belonging to it or in any way appertaining thereto, except such property as may be held or levied upon by attachment or levy, with power, however, to take possession of such last-described property so soon as such attachments or levy shall be removed by due process of law; and the said receiver shall take and hold all of the property of said defendant hereinbefore described, to use and dispose of the same under the orders of this court, and until otherwise ordered that said Fayette Brown, as such receiver,
in the name of said defendant company, according to the usual
13 course of business thereof, — to the best advantage of all the parties or persons concerned, and generally to put and keep the said property in efficient and safe condition for use, subject to the further order of this court; and the corporate officers of said company and whoever may have possession of the aforesaid property or any part thereof, including employees having the custody and charge of any of said property and effects, except such persons as may be in possession of said property by virtue of writs of attachments of executions, are hereby ordered to yield possession of such property to said receiver forthwith. Upon request of said receiver all books and papers, accounts and other evidences of debt, shall also be delivered to said receiver or to such agents and employees as may be designated by him; and all of said property hereinbefore described, without any actual delivery, immediately upon his giving

bond and taking the oath required, shall be held and taken to be vested in his actual possession and subject to his order for all purposes needful in the prosecution of the business of said defendant company and of all matters appertaining to his receivership, and said receiver is hereby authorized to retain and employ all such agents, servants, laborers, clerks, and assistants as in his discretion may be necessary to carry this order into effect with economy and prudence, and for said purposes he is hereby fully authorized and empowered to appropriate and apply the property and effects aforesaid so far as the same may be necessary, and as such receiver, in the corporate name of said company, he is hereby authorized to make and enter into all contracts for the obtaining of necessary supplies and for the prosecution of said business. Said receiver is required to keep or cause to be kept in a regular and systematic manner strict accounts of the business of said trust in his hands, and he is required to file in the office of the clerk of this court,
14 on or before the fourth Monday of each month, an abstract account of his receipts and disbursements for the preceding month; and said receiver is required to proceed, without unnecessary delay after he enters upon the discharge of his duties, to make a schedule of the property of the said defendant which may come into his possession and file the same with the clerk of this court; and said receiver shall apply for any further order or direction that he may deem necessary in the discharge of his duties under this appointment; and said receiver is ordered and required to continue the operation of the works and the business of said defendant in the mode and manner that it has heretofore been carried on by said company, according to his discretion and judgment it is for the best interest of all creditors and other persons in interest; and now comes the said Fayette Brown, the receiver appointed by the court in this cause, and accepts said appointment, and gave bond, with Amasa Stone, Selah Chamberlain, and Charles A. Otis as surety therein, which bond and surety are approved and accepted by the court, and said bond is filed with the clerk of this court; whereupon said Fayette Brown was duly sworn as such receiver.

15 *Order Book, p.* 314.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & Co. } In Chancery.

In this cause it appearing that the defendant, Brown, Bonnell & Co., has failed to plead, answer, or demur to the answer and cross-bill or intervening petition of the Commercial National Bank and others, it is ordered, on motion of the solicitor for said Commercial National Bank and others, that all and singular the allegations contained in said answer and cross-bill or intervening petition be taken as confessed by said defendant, Brown, Bonnell & Co., and that an order *pro confesso* be entered against said defendant.

(Signed) A. ST. J. NEWBERRY,
Solicitor for the Commercial National Bank and Others.

Sept. 11th, 1884.

16 *Statement of Real and Personal Property of Brown, Bonnell, & Co. Taken Possession of by Fayette Brown, Receiver, Feb'y 20, 1883, as per Schedule, in Detail Herewith Presented.*

Schedule.			
A.	Plant at Youngstown, consisting of two blast furnaces, mills, nail, link, and pin factories, 32⅕ acres of land, water works, tanks, machine shop, foundry, 3⅛ miles steel-rail railroad, & 2⅛ miles narrow-gauge railroad, mill, furnace, & other equipment & tools complete—see schedule—valued by three experts at		1,160,410 00
B.	Plant at Struthers', consisting of 1 blast furnace, 74½ x 16 ft., remodeled & rebuilt in 1881; capacity, ab't 80 to 120 tons per day—see Schedule B—cost in 1882 by purchase by B., B. & Co.		150,000 00
C.	Iron, nails, & other property attached by Republic Iron Co., afterwards turned over to receiver under agreement & by order of court—bar iron at 1.75 & nails 2.75 rates	43,248 60	
D.	Bar iron, nails, spikes, and other manuf'd and partly manufactured product, coal, pig-iron, and other materials in and about the mills—Schedule D	99,576 50	
E.	Bar iron, nails, spikes, &c., in warehouse, sheet iron at $2\frac{2}{24}$ bars 1.80 flat, nails 2.75 rates—Schedule E	6,453 35	
F.	Iron, &c., shipped per acc't of J. V. Ayer's Sons, but stopped in transit and del'v'd by receiver direct to purchasers—invoice prices, less 10 %—Sched. F	17,739 37	
G.	Iron, &c., loaded, but not charged to Ayers Sons, afterwards shipped direct to purchasers—invoice price, less 10 %	17,604 50	
		$184,622 32	1,310,410 00
17	Amounts bro't forward	184,622 32	1,310,410 00
H.	Iron, nails, &c., shipped to J. V. Ayer's Sons, afterwards stopped in transit and shipped back to Youngstown; invoice price, less 10 %	10,096 18	
I.	Nails and links, in Ayer's Sons' warehouse at Chicago, turned over to agent for receiver and nails all sold; invoiced 5 % less than invoice	13,319 74	
J.	Pig-iron, ore, coal, coke, and other materials, at the Struthers, Falcon, & Phœnix blast furnaces; see Schedule J	35,300 44	
K.	Supplies in storehouse; see Schedule K	6,907 95	
		250,246 63	
L.	Rolling stock, consisting of 4 locomotives and 95 coal and coke cars; cost, as per ledger, $62,836.88; see Schedule L	44,250 00	
	Total of inventory		294,496 63

	There is also shown on the books the following properties and interests:		
	Mahoning Coal Co.:		
	Capital stock, $140,000: 4-7 of the stock owned by B., B. & Co.; coal mines in Brookfield, O., under leases, mostly at 12½ cts. royalty, operated by B., B. & Co. and Himrod Furnace Co.; mines have been very productive and profitable; stands on ledger at cost of	275,000 00	
	Lawrence Ore Co., Limited, Wampum, Pa.:		
	Iron-ore mine operated jointly by B., B. & Co. and Himrod Furnace Co.; half interest in same owned by B., B. & Co.; stands on ledger at cost of	52,500 00	
	Amounts forward	327,500 00	1,604,906 63
18	Amounts bro't forward	327,500 00	1,604,906 63
	Mahoning Coke Co., Limited, Dunbar, Pa.:		
	All the shares or interests owned by B., B. & Co.; property consists of about 11½ acres of land in fee and 185 acres of coal land at a royalty of 20c. per 100 bushels, 100 coke ovens, 1¼ miles of railroad connecting with Penna. & Balto. & O. lines; dwellings, store, and equipment for mine and coke works complete; stands on ledger at cost of	80,000 00	
	Erskine & Co.:		
	2-3rds interest in a fire-brick manufactory on company's grounds at Youngstown; most of the brick used by B., B. & Co.; stands on ledger at cost of	8,944 84	
	Lowell Limestone Co., near Lowell, O.:		
	5-12ths interest in a limestone quarry from which works are partly supplied; stands on ledger at cost of	7,708 34	
	Excelsior Building Association:		
	Stock in same; stands on ledger at cost of	399 61	
	Koplin Self-Feeder:		
	For nail machines; patents and sole rights for the United States; stands on ledger at cost of	12,650 00	
		437,202 79	
	50 per cent is probably a full valuation of these items		437,202 79
	There is also shown by the books to be cash due from banks, accounts, and bills receivable supposed to be good, amounting to		83,600 24
	Total of property inventoried and of plant and other assets, at nominal values		$2,125,709 66

FAYETTE BROWN,
Receiver of Brown, Bonnell & Co.

[Endorsed:] No. 4195. Condensed inventory and schedule of property & assets of Brown, Bonnell and Co. Filed March 23rd, 1883. A. J. Ricks, clerk U. S. circuit court.

19 In Circuit Court of the United States, Northern District of Ohio.

LAKE SUPERIOR IRON CO., JACKSON IRON CO., and NEGAUNEE CONCENTRATING CO.
vs.
BROWN, BONNELL & CO.

The defendant, Brown, Bonnell & Co., — plea to the whole of the bill of complaint and the supplemental bill of complaint (by protestation, not confessing or acknowledging the matters and things in and by said bill and supplemental bill to be true), saith—

That since the institution of this action, to wit, on this 24th day of November, 1883, there has been paid by this defendant into the hands of the clerk of this court the sum of five thousand three hundred and eighty-nine $\frac{92}{100}$ dollars ($5,389.92), being the entire amount of the principal and interest of the judgment obtained by the Negaunee Concentration Company on February 20, 1883, in this court, and this defendant also, on the date last aforesaid, paid to the clerk of this court the sum of $68.94 in full for all the costs of said action, and the said judgment is now fully paid and satisfied; all of which matters and things the defendant is ready to verify, and prays judgment whether it should be compelled to make any other or further answer to said original or supplemental bill, and that it be hence dismissed, etc.

(Signed) BROWN, BONNELL & CO.,
By HENRY CRAWFORD, *Sol.*

20 And the said defendant, for further plea to the said original and supplemental bill (by protestation), saith that the complainants in and by their said bill of complaint and supplemental bill have stated facts showing that they have a plain, adequate, and complete remedy at law, and for such reason and on the face of the said pleadings this court has no jurisdiction whatever over the subject-matter of this action and no lawful power to enter any order or make any decree whatever therein; all which matters this defendant is ready to verify, and prays that this court will enter an order dismissing the cause for want of jurisdiction.

(Signed) BROWN, BONNELL & CO.,
By HENRY CRAWFORD, *Sol.*

U. S. OF AMERICA, *Northern District of Ohio:*

Henry Crawford, on oath, says he is the solicitor of the defendant, and that the matters set forth in the above two pleas are true and not interposed for delay.

(Signed) HENRY CRAWFORD.

Subscribed and sworn to before me by said Henry Crawford on the 24th day of Nov., 1883.

(Signed) A. J. RICKS, *Clerk.*

In my opinion, the above pleas are well founded in point of law.

(Signed) HENRY CRAWFORD.
A. J. JONES.

21 [Endorsed:] 4195. United States circuit court, northern district of Ohio. Lake Superior Iron Co., &c., *vs.* Brown, Bonnell & Co. Pleas of the corporation defendant. Filed Nov. 24, 1883. A. J. Ricks, clerk U. S. circuit court. H. Crawford, sol.

22 Circuit Court of the U. S., Northern District of Ohio.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & CO.

The defendant, Brown, Bonnell & Co., by Henry Crawford, solicitor, and by F. H. Matthews, vice-president and acting president of said company, by leave of court first had, moves the court to discharge the receiver heretofore appointed herein on Feb. 20th, 1883, and for cause assigns—

1st. That said court has no jurisdiction over the subject-matter of this controversy and no jurisdiction to appoint a receiver.

2nd. Because on November 24th, 1883, the said judgment of the Negaunee Concentrating Company was fully paid and discharged, together with all costs, by payment of the full amount thereof to the clerk of this court, as duly appears by record.

(Signed) HENRY CRAWFORD, *Solicitor.*
F. H. MATTHEWS,
Vice-President & Acting Pres't.
BROWN, BONNELL & CO.

23 [Endorsed:] 4195. Circuit court of the U. S., northern dist. of Ohio. Lake Superior Iron Co. *et al. vs.* Brown, Bonnell & Co. Motion to discharge receiver. Filed Dec. 18th, 1883. A. J. Ricks, clerk.

24 United States Circuit Court, Northern District of Ohio.

MONDAY, *December 24th*, 1883.

Present: The Honorable Martin Welker, district judge.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } Chancery. No. 4195.

In this cause the motion filed herein by Henry Crawford, as solicitor for the defendant, Brown, Bonnell and Company, and by F. H. Matthews, as vice-president and acting president of said defendant

company, whereby the court is asked to discharge the receiver heretofore appointed herein for causes stated in said motion, came on to be heard; whereupon, upon consideration, the court orders that the said motion be overruled and the prayer thereof disallowed.

25 United States Circuit Court, Northern District of Ohio.

MONDAY, *December 24th*, 1883.

Present: The Honorable Martin Welker, district judge.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } Chancery. No. 4195.

In this cause, on motion of complainant, The Negaunee Concentrating Co., it is ordered that the clerk of this court transfer the fund paid into his hands by Henry Crawford, Esq., for Brown, Bonnell & Co. in satisfaction of the judgment and interest thereon due the Negaunee Concentrating Company, as judgment creditor in case No. 4196 on the docket of this court, to this case; and thereupon, on motion of the complainant, the said Negaunee Concentrating Company, and it appearing to the court that the said company is entitled to said sum of $5,389.92 so as aforesaid paid to the clerk, it is now ordered that the clerk pay said sum to said complainant or Francis J. Wing, its attorney of record, and take his receipt therefor.

26 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

The joint and several answers and cross-bill of Commercial National Bank, Charles A. Otis, William H. Harris, Dan. P. Ealls, and John Hay and Samuel Mather, executors of estate of Amasa Stone, deceased, and Dan. P. Ealls and John Hay, trustees, defendants, to the bill and supplemental bill of complaint of The Lake Superior Iron Company *et al.*, complainants.

And now comes the Commercial National Bank, a national banking association duly incorporated and organized under and by virtue of the laws of the United States of America; Charles A. Otis, William H. Harris, Dan. P. Eells, and John Hay and Samuel Mather, as executors of the estate of Amasa Stone, deceased, said Stone having died since the commencement of this suit, leaving a will wherein he appointed said Hay and Mather executors thereof, which will was on the — day of —— duly admitted to probate in the probate court of Cuyahoga county, Ohio, and letters testamentary were on the — day of —— by said court duly issued thereon to the said Hay and Mather, who thereupon duly qualified and entered on the duties of their said office; and also now come the said Dan P.. Eells, trustee, and the said John Hay, trustee, and by way of answer and cross-bill to the original bill and supplemental bill of complainants filed in this cause say that the defendant, Brown, Bonnell and Company, is indebted to them and each of

them respectively, and that said indebtedness is secured to them as hereinafter set forth. Said Commercial National Bank, at the request of said Brown, Bonnell and Company, discounted eleven separate promissory notes made by John V. Ayer's Sons, of Chicago, Illinois, to the order of and endorsed by said Brown, Bonnell and Company.

One of said notes dated September 15, 1882, for the sum of $5,583.14, payable at the Union National Bank on February 20, 1883, and due February 23, 1883.

Another of said notes dated December 30th, 1882, for the
27 sum of $5,511.74, payable at the Union National Bank on May 19th, 1883, and due May 22, 1883.

Another of said notes dated December 30, 1882, for the sum of $5,536.72, payable at the Union National Bank on May 21st, 1883, and due May 24, 1883.

Another of said notes dated December 30, 1882, for the sum of $5,591.67, payable at the Union National Bank on May 22, 1883, and due May 25, 1883.

Another of said notes dated December 30, 1882, for the sum of $5,656.19, payable at the Union National Bank on May 23, 1883, and due May 26, 1883.

Another of said notes dated December 30, 1882, for the sum of $5,673.29, payable at the Union National Bank on May 25, 1883, and due May 28, 1883.

Another of said notes dated January 31, 1883, for the sum of $$5,791.11, payable at the Union National Bank on June 17, 1883, and due June 20, 1883.

Another of said notes dated January 31, 1883, for the sum of $5,643.12, payable at the Union National Bank on June 18, 1883, and due June 21, 1883.

Another of said notes dated January 31, 1883, for the sum of 5,511.22, payable at the Union National Bank on June 19, 1883, and due June 22, 1883.

Another of said notes dated January 31, 1883, for the sum of $5,516.86, payable at the Union National Bank on June 20, 1883, and due June 23, 1883.

Another of said notes dated January 31, 1883, for the sum of $4,880.38, payable at the Union National Bank on June 22, 1883, and due June 25, 1883.

That said notes were duly presented for payment at the times when and at the places where they were respectively made payable, of all of which said Brown, Bonnell and Company had due notice, the aggregate face value of said notes being $60,879.44, and they also paid fees for the protest of one of said notes due February 23,
1883, amounting to $2.30, making a total of $60,881.74, less
28 an amount paid by said last-named company on one of said notes due February 23, 1883, of the sum of $778.80, leaving a balance of $60,102-94, no part of which has been paid by said John V. Ayer's Sons nor by said Brown, Bonnell & Company, and the same is still due to said Commercial National Bank, with interest on each of the sums for which said notes were given from the time

they respectively became due. Copies of said notes, with all endorsements thereon, are hereto attached, marked, respectively, Exhibits A, B, C, D, E, F, G, H, I, J, and K, and reference made thereto.

That said Dan. P. Eells, at the request of said defendant, Brown, Bonnells and Company, endorsed for the accommodation of said company five certain promissory notes described as follows:

One of said notes dated October 19, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, on March 21, 1883, and due March 24th, 1883.

Another of said notes dated November 18, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, four months after date and due March 21, 1883.

Another of said notes dated December 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on April 18, 1883, and due April 21, 1883.

Another of said notes dated December 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on May 22, 1883, and due May 25, 1883.

Another of said notes dated December 24, 1882, for the sum of $8,333.00, payable at Commercial National Bank, Cleveland, Ohio, on April 23, 1883, and due April 26, 1883.

All of which notes were executed by said Brown, Bonnell and Company to the order of said Dan. P. Eells, and endorsed by him for the accommodation of said company as aforesaid, and which said notes said Brown, Bonnell and Company negotiated by
29 getting the same discounted, and thereby received the face value thereof, less discount. Said notes were duly presented for payment at the times when and the places where they were respectively made payable, of all which said Brown, Bonnell and Company had due notice, but said company failed to pay said notes or any one of them when they respectively became due and payable as aforesaid, and said Eells has been compelled to pay and has paid to the holders of said promissory notes the sums so due by the terms of each, respectively, amounting in the aggregate to the sum of $37,499.66, of all which said Brown, Bonnell & Company had due notice, no part of which said sum has been paid by said Brown, Bonnell and Company, and the same is still due to said Ealls, with interest on each of the sums for which said notes were given from the time when they respectively became due; copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits L, M, N, O, and P, respectively, and reference made thereto.

That said Charles A. Otis, at the request of said Brown, Bonnell and Company, endorsed for the accommodation of said company eight certain promissory notes executed by said Brown, Bonnell and Company to the order of said Charles A. Otis, and by him endorsed as aforesaid. Said notes are described as follows:

One of said notes dated December 4, 1882, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on April 16, 1883, and due April 19th, 1883.

Another of said notes dated December 4, 1882, for the sum of

$5.000.00, payable at Commercial National Bank, Cleveland, Ohio, on April 17, 1883, and due April 20, 1883.

Another of said notes dated December 4, 1882, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on April 18, 1883, and due April 21, 1883.

30 Another of said notes dated December 4, 1882, for the sum of $10,000.00, payable at Commercial National Bank, Cleveland, Ohio, on April 20, 1883, and due April 23, 1883.

Another of said notes dated December 4, 1882, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on May 15, 1883, and due May 18, 1883.

Another of said notes dated December 4, 1882, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on May 16, 1883, and due May 19, 1883.

Another of said notes dated December 4, 1883, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on May 18, 1883, and due May 21, 1883.

Another of said notes dated December 4, 1883, for the sum of $10,000.00, payable at Commercial National Bank, Cleveland, Ohio, on May 19, 1883, and due May 22, 1883.

All of which said notes said Brown, Bonnell & Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. The aggregate face value of said notes amounted to the sum of $50,000.00.

Said notes were duly presented for payment at the times when and the places where they were respectively made payable, of all which said Brown, Bonnell and Company had due notice, but said company failed to pay said notes or any one of them when they respectively became due and payable as aforesaid, and said Charles A. Otis has been compelled to pay and has paid to the holders of said promissory notes the sums so due by the terms of each respectively, amounting in the aggregate to the sum of $50,000.00, of all which said Brown, Bonnell and Company had due notice; no part of which said sums of $50,000.00 has been paid by said Brown, Bonnell and Company, and the same is still due to said Otis, with interest on each of the sums for which said notes were given from the time when they respectively became due.

31 Copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits Q, R, S, T, U, V, W, and X, respectively, and reference made thereto.

That said William H. Harris endorsed, at the request of said Brown, Bonnell and Company, for the accommodation of said company, five certain promissory notes executed by said Brown, Bonnell and Company to the order of said William H. Harris, and by him endorsed for the accommodation of said company as aforesaid. Said notes are described as follows:

One of said notes dated October 19, 1882, for the sum of $8,333.34, payable at Commercial National Bank, Cleveland, Ohio, on March 23, 1883, and due March 26, 1883.

Another of said notes dated November 18, 1882, for the sum of

$8,333.34, payable at Commercial National Bank, Cleveland, Ohio, four months after date and due March 21, 1883.

Another of said notes dated December 4, 1882, for the sum of $8,333.00, payable at Commercial National Bank, Cleveland, Ohio, on April 24, 1883, and due April 27, 1883.

Another of said notes dated December 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on April 24, 1883, and due April 27, 1883.

Another of said notes dated December 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on May 23, 1883, and due May 26, 1883.

All of which said notes said Brown, Bonnell and Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. The aggregate face value of said notes amounted to the sum of $37,499.68.

Said notes were duly presented for payment at the times when and the places where they were respectively made payable,
32 of all which said Brown, Bonnell and Company had due notice, but said company failed to pay said notes or any one of them when they respectively became due and payable as aforesaid, and said William H. Harris has been compelled to pay and has paid to the holders of said promissory note- the several sums so due by the terms of each, respectively, amounting in the aggregate to the sum of $37,499.68; of all which said Brown, Bonnell and Company had due notice; no part of which said sum of $37,499.68 has been paid by said Brown, Bonnell and Company, and the sum is still due to said Harris, with interest on each of the sums for which said notes were given from the time when they respectively became due; copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits 1, 2, 3, 4, and 5, respectively, and reference made thereto.

That said Amasa Stone, during his lifetime, at the request of said Brown, Bonnell and Company, for the accommodation of said company, endorsed five certain promissory notes executed by said Brown, Bonnell and Company to the order of said Amasa Stone, and by him endorsed for the accommodation of said company as aforesaid. Said notes are described as follows:

One of said notes dated November 18, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, four months after date and due March 21, 1883.

Another of said notes dated December 4, 1882, for the sum of $8,333.00, payable at Commercial National Bank, Cleveland, Ohio, on April 21, 1883, and due April 24, 1883.

Another of said notes dated December 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on April 17, 1883, & due April 20, 1883.

Another of said notes dated December 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on May 16, 1883, and due May 19, 1883.

33 Another of said notes dated October 19, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, on March 19, 1883, and due March 22, 1883.

All of which said notes said Brown, Bonnell and Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. The aggregate face value of said notes amounted to the sum of $37,499.66.

Said notes were duly presented for payment at the times when and the places where they were respectively made payable, of all which said Brown, Bonnell and Company had due notice, but said company failed to pay said notes or any one of them when they respectively became due and were presented for payment as aforesaid, and said Amasa Stone was compelled to pay and did pay to the holders of said promissory notes the said several sums so due by the terms of each, respectively, amounting in the aggregate to the sum of $37,499.66, of all which said Brown, Bonnell and Company had due notice, and no part of said sum of $37,499.66 has been paid by said Brown, Bonnell and Company, and the same is still due to the estate of said Amasa Stone, deceased, with interest on each of the sums for which said notes were given from the time when they respectively became due; copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits 6, 7, 8, 9, and 10, respectively, and reference made thereto.

And to secure the payment of the aforesaid notes so discounted and endorsed by the respective parties above named said Brown, Bonnell and Company delivered to each of said parties certain mortgage bonds, hereinafter particularly specified, as collateral security or pledge to secure the payment of said promissory notes and to save said endorsers harmless from the payment thereof and from
34 all liability on account of their said respective endorsements, said bonds having been executed and delivered to Dan. P. Ealls and John Hay (as trustees) or bearer by said Brown, Bonnell and Company, and were for the sum of five thousand dollars each and interest thereon at the rate of six per cent. per annum, payable semi-annually, coupons or interest warrants being attached to said bonds representing said interest—

Said bonds so pledged being a part of a series of one hundred bonds numbered consecutively from one to No. 100, inclusive, all of like date (being dated April 3rd, A. D. 1882) and amount, and of the same tenor, except as to the time of their maturity, of which series six bonds, numbered consecutively from No. 1 to No. 6, inclusive, are payable on the 3rd day of April, 1884; seven bonds, numbered consecutively from No. 7 to No. 13, inclusive, are payable on the 3rd day of April, 1885; eight bonds, numbered consecutively from No. 14 to No. 21, inclusive, are payable on the 3rd day of April, 1886; nine bonds, numbered consecutively from No. 22 to No. 30, inclusive, are payable on the 3rd day of April, 1887; ten bonds, numbered consecutively from No. 31 to No. 41, inclusive, are payable on the 3rd day of April, 1888; twelve bonds, numbered consecutively from No. 42 to No. 53, inclusive, are payable on the 3rd day of April, 1889; fourteen bonds, numbered consecutively from No. 53 to No. 66, inclusive, are payable on the 3rd day of April, 1890; sixteen bonds, numbered consecutively from No. 67 to No. 82, inclusive, are payable on the 3rd day of April, 1891, and eighteen bonds, num-

bered consecutively from No. 83 to No. 100, inclusive, are payable on the 3rd day of April, 1892, and the payment of the principal and interest of all of said bonds is secured by mortgage or deed of trust in the nature of a mortgage, bearing even date with said
35 bonds, made by said Brown, Bonnell and Company to said Dan. P. Eells and John Hay, trustees, conveying to them in trust for the security of the successive holders of all or any of said bonds, on the real estate of said corporation, situated in the city of Youngstown, county of Mahoning and State of Ohio, consisting of about forty-five acres of land, with the two blast furnaces, six iron-rolling mills, and other buildings, improvements, fixed machinery, and other fixtures thereon, and of all the interest of said Brown, Bonnell and Company in what is known as the Struther's blast furnace property, comprising about thirty-two acres in the township of Poland, in said county; and is further secured by a pledge in writing to said Dan. P. Ealls and John Hay, trustees, upon the trust aforesaid, of seven hundred and ninety-three shares, of no market value, as far as is known to defendants, of the Mahoning Coal Company, a mining corporation of said State of Ohio, to copies of which mortgage and pledge hereto attached, marked Exhibits "11" and "12," respectively, and said mortgage copy made a part of this pleading, reference is hereby made for a particular description of the premises and property so included therein to secure the payment of said bonds, the conveyance of said property being absolute, except upon the performance of all the conditions in said mortgage contained, among which conditions was one that said Brown, Bonnell & Company should pay according to the tenor thereof each and every one of said bonds, with all the interest thereon as it became due.

And the aforesaid answering defendants aver that said condition has not been complied with, a large amount of interest having become due upon said bonds has not been paid, according to
36 the tenor thereof, and the coupons thereto attached, amounting in all upon the bonds so held by these answering defendants to the sum of thirty-one thousand five hundred dollars, with interest from the time said coupons became due, amounting to $——; and said answering defendants aver that said bonds so held by them have been certified as required by the terms of said mortgage, and all of the conditions required to be performed by said trustees have in all respects been performed, while said Brown, Bonnell and Company have failed to perform the condition hereinbefore specified, as well as other conditions of said mortgage on its part to be performed, and said deed has become absolute. Said mortgage was duly received for record by the recorder of said county of Mahoning, at this office, on the 17th day of February, 1883, at 2.35 o'clock p. m., and duly recorded February 19, 1883, in Mahoning County, Ohio, Records of Mortgages, in volume 21, at page 265, &c., and became and is a first lien on the property therein described.

Said Commercial National Bank holds thirty of the aforesaid bonds, numbered from 71 to 100, both inclusive.

Said Dan. P. Ealls holds sixteen of the aforesaid bonds, numbered from 1 to 16, both inclusive.

Said Charles A. Otis holds sixteen of the aforesaid bonds, numbered from 33 to 44, both inclusive, and 61 to 64, inclusive.

Said William H. Harris holds sixteen of the aforesaid bonds, numbered from 17 to 32, both inclusive.

Said executors of the estate of Amasa Stone, deceased, hold sixteen of the aforesaid bonds, numbered from 45 to 60, both inclusive.

And said answering defendants further aver that the con-
37 ditions upon which said bonds were pledged to them, respectively, have been broken, and said bonds or the proceeds thereof belong to said answering defendants, and they are entitled to the amount of interest now due and unpaid upon said bonds as applicable upon the claims so held against said Brown, Bonnell and Company as hereinbefore specified; and said defendants, Ealls and Hay, trustees, aver that the facts hereinbefore set forth in this pleading are in all respects true, and they reassert the same; and said answering defendants, together with said defendants, Ealls & Hay, trustees, and all of said answering defendants pray that in default of payment of the amount of interest now due or the amount of principal and interest that may become due before a final decree shall be taken herein that said mortgage may be foreclosed and said premises sold free of all claims of said Brown, Bonnell and Company and the proceeds thereof applied to the payment of the amounts so found due these answering defendants as they may be respectively entitled thereto.

And said answering defendants admit that, except as hereinbefore stated, the averments and allegations set forth in the original and supplemental bills are true, and they reassert the same in their own behalf; and they aver that since the commencement of this suit, as they are informed and believe and aver the facts so to be, that the president of said Brown, Bonnell and Company, Herbert C. Ayer, who has become insolvent and was insolvent prior to October 20, 1883, and had not in any way acted for said company since his insolvency became known, which was some time in February of said year, did, on the 20th day of October, 1883, by an instru-
ment of writing of that date, to which he signed the
38 name of Brown, Bonnell and Company by himself, as president, appoint Henry Crawford, of Chicago, Illinois, general counsel of said Brown, Bonnell and Company, thereby authorizing and directing him to take full and exclusive charge of all litigation against or in favor of said corporation, and to fully represent and appear for it in all legal proceedings and take care of its interests in all negotiations for arrangements or composition with its creditors or for reorganization, as will appear by a copy of said instrument of writing which is attached hereto and marked "Exhibit Z," and to which reference is hereby made.

All of which was done without any authority whatsoever from the board of directors or stockholders of said corporation and without their knowledge or consent and for the purpose of giving preference to certain creditors of said corporation and to damage the

rights and interests of others, and that said property might be taken from the hands of the receiver appointed by this court whereby it might be endangered, wasted, and thereby the securities of these answering defendants greatly lessened; and pursuant to said fraudulent design, in giving preference to certain of said creditors, the said Henry Crawford, so representing said Brown, Bonnell and Company, without the authority of its stockholders and board of directors, did, on or about the 23rd day of November, A. D. 1883, appear before the court of common pleas of Mahoning county, in said State of Ohio, and by his confession thirty-three judgments were entered against said corporation, amounting in the aggregate to the sum of five hundred and seventy thousand eight hundred and six dollars and sixty-nine cents; which judgments were so entered without the authority of said company, as hereinbefore stated.

Wherefore these answering defendants, together with said
39 Eells and Hay, trustees, also pray, for the reasons set forth in the original and supplemental bill and on account of the facts hereinbefore stated occurring since the filing thereof, that the receiver heretofore appointed by this court in this cause may be retained until the rights of all the parties therein shall be determined and the final decree shall be entered herein.

And for such other and further relief as these answering defendants may be entitled to and as equity and good conscience may require.

JOEL W. TYLER,
A. ST. J. NEWBERRY,
Sol's for Def'ts.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

Dan. P. Eels, being first duly sworn, on oath says that he is one of the defendants named in the foregoing answer and cross-bill; that he has read the same and is acquainted with its contents, and that the facts stated and allegations contained therein are true as he verily believes.

DAN. P. EELLS.

Subscribed in my presence and sworn to before me this 1st day of December, A. D. 1883.

[SEAL.] G. W. SHUMWAY,
Notary Public.

"EXHIBIT Z."

NEW YORK, *Oct.* 20, 1883.

Henry Crawford, of Chicago, Ill., is hereby appointed general counsel of Brown, Bonnell & Co., and as such is authorized and directed to take full and exclusive charge of all litigation against or in favor of said corporation and to fully represent and appear for it in all legal proceedings and take care of its interests in all negotia-

tions for arrangements or composition with its creditors or for reorganization.

BROWN, BONNELL & CO.,
By H. C. AYER, *President.*

40 "EXHIBIT 11."

This indenture, made this third day of April, A. D. one thousand eight hundred and eighty-two, by and between Brown, Bonnell and Company, a corporation organized and existing under the laws of the State of Ohio, party of the first part, and Dan. B. Eells and John Hay, of the city of Cleveland, Ohio, parties of the second part, witnesseth:

That whereas the party of the first part, being thereto empowered by law, has, by due action taken, resolved to borrow money in the aggregate — five hundred thousand dollars and to issue therefore its bonds bearing even date herewith, one hundred in number, in the denomination of five thousand dollars each, all of like tenor except as to the time of their maturity; of which bonds six are payable in two years, seven in three years, eight in four years, nine in five years, ten in six years, twelve in seven years, fourteen in eight years, sixteen in nine years, and eighteen in ten years from the date hereof, the bonds to be duly executed under the seal of the party of the first part, by the president and treasurer thereof, and the interest coupons to be authenticated by the lithographed *fac-simile* of the signature of said treasurer, and the bonds also to bear the certificate of the parties of the second part; each of which bonds, with the coupons attached, shall, except as to the time of maturity, be of the tenor and effect following—that is to say:

UNITED STATES OF AMERICA,
State of Ohio.

No. —. $5,000.

Brown, Bonnell and Company, a corporation organized and existing under the laws of Ohio, acknowledges itself indebted unto Dan. P. Eells and John Hay or bearer in the sum of five thousand dollars, and promises to pay the same on the third day of April, A. D. one thousand eight hundred and — (18—), at the Commercial National Bank, in the city of Cleveland, Ohio, and to pay
41 interest thereon from and after the third day of April, 1882, at the rate of six per centum per annum, semi-annually, on the third days of October and April in each year, at said bank, upon presentation and surrender of the interest warrants hereto attached as they respectively become payable.

This bond is one of a series of one hundred bonds numbered consecutively from number one to number one hundred, inclusive, all of like date and amount and of the same tenor, except as to the time of their maturity; of which series, six bonds, numbered consecutively from number one to number six, inclusive, are payable on the 3rd day of April, 1884; seven bonds, numbered consecutively

from number seven to number thirteen, inclusive, are payable on the 3rd day of April, 1885; eight bonds, numbered consecutively from number fourteen to number twenty-one, inclusive, are payable on the 3rd day of April, 1886; nine bonds, numbered consecutively from number twenty-two to number thirty, inclusive, are payable on the 3rd day of April, 1887; ten bonds, numbered consecutively from number thirty-one to number forty, inclusive, are payable on the 3rd day of April, 1888; twelve bonds, numbered consecutively from number forty-one to number fifty-two, inclusive, are payable on the 3rd day of April, 1889; fourteen bonds, numbered consecutively from number fifty-three to number sixty-six, inclusive, are payable on the 3rd day of April, 1890; sixteen bonds, numbered consecutively from number sixty-seven to number eighty-two, inclusive, are payable on the 3rd day of April, 1891, and eighteen bonds, numbered consecutively from number eighty-three to number one hundred, inclusive, are payable on the 3rd day of April, 1892. The payment of the principal and interest of all of said bonds is secured by a deed in the nature of a mortgage, bearing even date herewith, made by said corporation to said Dan. P. Eells and John Hay, trustees, conveying to them in trust, for the security of the
42 successive holders of all of said bonds, all the real estate of said corporation situate in the city of Youngstown, county of Mahoning and State of Ohio, consisting of about forty-five acres of land, with the two blast furnaces, six iron-rolling mills, and other buildings, improvements, fixed machinery, and other fixtures thereon, and of all the interest of said corporation in what is known as the Struther's blast furnace property, comprising about 32 acres in the township of Poland, in said county, and is further secured by a pledge in writing to said Dan. P. Eells and John Hay, upon the trust aforesaid, of 793 shares of the capital stock of the Mahoning Coal Company, a mining corporation of the said State of Ohio, to which mortgage and pledge reference is hereby made, and upon the certificate of said trustees hereon endorsed this bond will become secured by the said mortgage and by said pledge of shares.

In testimony whereof the said corporation, Brown, Bonnell and Company, has caused its corporate seal to be hereto affixed and this bond to be subscribed by its president and treasurer and the accompanying interest warrants to be authenticated by the lithographed *fac-simile* of the signature of said treasurer on this third day of April, A. D. 1882.

[SEAL.]

—— ——, *President.*
—— ——, *Treasurer.*

(*Trustee's Certificate.*)

We hereby certify that the within bond is issued under and by virtue of the deed in the nature of a mortgage therein named, and that the payment of the principal and interest of said bond is secured by said mortgage and by the pledge of shares therein named.

(*Coupon.*)

$150.00. On the third day of October, 1882, Brown, Bonnell and Company will pay to the bearer, at the Commercial National Bank, in the city of Cleveland, Ohio, one hundred and fifty dollars, being the semi-annual interest that day due on its bond No. —.

F. H. MATHEWS, *Treasurer.*

43 And whereas, for the purpose of securing the payment of said bonds and the interest thereon, the party of the first part is by law authorized and has, by due action taken, determined to make this deed in the nature of a mortgage, and directed its president and secretary to execute and deliver said deed to the parties of the second part as trustees:

Now, therefore, in order to secure the payment of said bonds and the interest coupons thereto attached, and the performance on its part of its covenants in this indenture contained, and in consideration of one dollar to it paid by the parties of the second part, the receipt whereof is hereby acknowledged, the par*ties* of the first part does hereby grant, bargain, sell, alien, convey, and confirm unto the parties of the second part and the survivor of them and unto his heirs and assigns forever all of the following twenty-nine par*cles* of land situate in the city of Youngstown, county of Mahoning and State of Ohio, and all and singular the two blast furnaces, the six rolling mills, and all the other buildings, structures, improvements, fixed machinery, and other fixtures thereon, of which par*cles* of land the 1st parcel is part of lot No. 10, in the east division of our lots in the original town plat of Youngstown, and is bounded as follows: Beginning at a post on the east line of the highway to Gibson's fording and 15 feet from common water mark in the Pennsylvania and Ohio canal, running thence south on the east line of said road 16 rods; thence east 10 rods; thence south 16 rods; thence west on the bank of said canal 15 feet from common water mark, 10 rods to the place of beginning, containing one acre of land. The 2d par*cle* is also a part of said out-lot No. 10, and is bounded as follows: Beginning at the northeast corner of the 1st parcel, 15 feet from the top water line of the said canal, running thence south 18 rods and 23 links to the Mahoning river; thence eastwardly on the north bank of said river 18 rods and 12 links to a post near the outlet of a ditch; thence north,
44 parallel with the east line of the 1st parcel, 16 rods and 21 links to the bank of said canal, and thence on the bank of said canal N. 86½° W. 18 rods to the place of beginning, containing about 2 acres and 17 perches. The 3rd parcel is bounded as follows: Beginning at the low water mark on the south bank of the Mahoning river and on the east line of the 2nd parcel on which stands the Falcon furnace, running thence north on said east line of the 2nd parcel to a stake 15 feet from the water in said canal; thence eastwardly, along the bank of said canal, keeping 15 feet from the water therein, to a point such that, if a line were drawn from it southerly parallel with the first-named boundary line of this parcel so as to meet a line drawn eastwardly along the bank of said river from the place of beginning, there would be contained within said

four boundary lines one acre of ground, and said parcel has for its boundary lines the said four described lines. The 4th parcel is known as part of lot No. 1, in the original survey of the south division of out-lots in the town plat of Youngstown, and is bounded on the northerly side by the outer line of the towing path of said canal; on the easterly side by the highway or street leading to the Mahoning bridge; on the southerly side by the Mahoning river, and on the westerly side by the west line of said lot No. 1, which is also the east line of lands formerly owned by *by* the late William Rayen, deceased. The 5th parcel is bounded as follows: Beginning at the northwest corner of a lot known as the Phœnix furnace lot and at a point 15 feet south of the common water mark in said canal; thence running S. 29¼° W. 8 chains and 35 links to low water mark on the north bank of the Mahoning river; thence N. 82¾° W. 6 chains 7½ links; thence N. 29¼° E. 3 chains 30⅓ links; thence N. 60¾° W. 1 chain 89½ links; thence N. 29¼° E. 5 chains 30 links to an iron stake 15 feet south of top water line of said canal; thence S. 73° E. 1 chain 72 links; thence S. 76¾° E. 6 chains
45 4 links to the place of beginning, containing about $5\frac{924}{1000}$ acres.

The 6th parcel is bounded and described as follows: Beginning at a point on the north line of the right of way and lands formerly belonging to the Pennsylvania and Ohio Canal Company, where said line is met by the west line of the east half of lot No. 33 of Bone and Wicks' subdivision of a part of the south division of out-lots in the town plat of Youngstown; thence running northerly along said west line to the south line of the north half of said lot No. 33; thence westerly along said south line and parallel with Bane street to the west line of said lot 33; thence northerly along said west line of said lot 30 feet; thence easterly parallel with Bane street to the west line of the east half of said lot; thence northerly along said west line of said east half of said lot 12 feet; thence easterly parallel with Bane street to the east line of said lot 33; thence northerly along said east line of said lot to the south line of Bane street; thence easterly along the south line of Bane street to a point where said south line of Bane street would be met by the production southerly of the east line of Walnut street; thence northerly along the southerly production of said east iine and along the east line of Walnut street to the northwest corner of lot No. 21 of said Bane and Wicks' subdivision; thence easterly parallel with Bane St. to the northeast corner of lot No. 16 of Bane & Wicks' said subdivision; thence easterly along the south line of an alley to the west line of Presq'Isle street; thence southerly along said west line last named to the north line of the right of way and lands formerly belonging to the said canal company, and thence westerly along said north line of the right of way and lands last named to the place of beginning. The 7th parcel is a part of lot No. 252 of latest numbering of lots in said city, and is bouuded as follows: Beginning at the southeast corner of said lot, thence running northerly along the east line thereof 18 feet; thence by a southwesterly course to a point on the south line of said lot distant westerly 45½ feet from
46 the southeast corner of said lot; thence easterly along

the south line of said lot 45½ feet to the place of beginning.

The 8th parcel is bounded as follows: Beginning at a point on the east line of Presq'Isle street S. 2½° W. 26 links from the southwest corner of a lot conveyed to Brown, Bonnell & Co. by C. H. Andrews *et al.* by a deed which is recorded in the records of said county in volume 20, at page 84 *et seq.*, thence running S. 2½° W. along said east line of said street 20 feet; thence S. 81½° E. 1 chain and 52 links; thence N. 40 E. 20 feet; thence N. 81½° W. 1 chain and 53 links to the place of beginning.

The 9th parcel is that part of lot 33 which was conveyed to Andrews & Hitchcock 2d July, 1860, by David Tod, and is bounded as follows: Beginning at a stake on the line between said lot and lot 32, 1 chain 68 links S. 29½° W. from the south line of Front street, thence running S. 29½° W. 95 links to the canal; thence up said canal 49 links; thence N. 4° E. 1 chain 50 links; thence S. 82¼° E. 31 links; thence S. 87¾° E. 58 links to the place of beginning.

The 10th parcel is that part of out-lot No. 32 of the southeast division of out-lots in the former village of Youngstown, which, on the 12th September, 1859, was conveyed by J. Warner to Andrews & Hitchcock, and is bounded as follows: Beginning at a stake where the west line of said lot 32 meets the berme bank of said canal, running thence N. 29½° E. 95 links; thence S. 85° E. 1 chain 23 links; thence S. 28½° W. 80 links; thence S. 89° W. 1 chain 30 links to the place of beginning.

The 11th parcel is the south part of city lot No. 281 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presq'Isle street S. 2½° W. 2 chains 78¼ links from the southeast corner of Front and Presq' Isle streets, thence running along the east line of Presq'Isle street S. 2½° W. 26 links; thence S. 79¾° E. 1 chain 53 links; thence N. 4° E. 21 links; thence N. 77° W. 1 chain 55 links to the place of beginning. The 12th parcel is known as city lot No. 280 of the latest numbering of lots in said city, and is bounded as follows:

47 Beginning at a point on the east line of Presq'Isle street S. 2½° W., 20 feet from the southwest corner of said lot No. 281, thence running along the east line of said street S. 2½° W., 65½ links to said canal; thence along the north side of high water in said canal S. 83½° E., 1 chain 50 links; thence N. 4° E., 52½ links; thence N. 79⅔° W., 1 chain 52 links, to the place of beginning. The 13th parcel is all the land which was conveyed on December 5th, 1863, by *by* William Lindsay *et ux* to the firm of Brown, Bonnell & Co. by a deed which is recorded in vol. 28, at pages 233 *et seq.*, which deed is here referred to. The 14th parcel is all the land ever owned or occupied by the Pennsylvania and Ohio Canal Company which lies between the center of Crab creek on the east and the east side of what is known as Rany's Mill, on the west, including between said east and west boundaries all of the land ever occupied by berme-bank water channel and towing path of said canal. The 15th parcel comprises all the lands conveyed to the firm of Brown, Bonnell & Co. by Henry Manning on November 26th, 1863, by a deed recorded in said records, in vol. 19, at page 111, except such part of said lands as lie- in

the 14th parcel and including all such rights as were conveyed by said Henry Manning in his said deed, which is here referred to. The 15 parcels above named were conveyed on the 9th day of October, 1875, by Joseph H. Brown *et al.* to the party of the first part by a deed which is recorded in the records of said county, in vol. 38, at page 606 *et seq.*, and is here referred to.

The 16th parcel is the west half of the south half of lot No. 33 in Bane and Wicks' said subdivision, and also all of lot 32 in said subdivision, except such part of said lot No. 32 as was sold by Almon Raney and wife and Bostwick Raney to Ellen Ferrall, and except also such part of said lot 32 as was conveyed by said Almon Raney and wife and Bostwick Raney to Ann McGraw by a deed which is recorded in the records of said county, in vol. 19, at page 493. Said
16th parcel was conveyed to said corporation 9th October,
48 1879, by H. O. Bonnell *et ux* by a deed recorded in said records, in vol. 45, at page 352. The 17th parcel is the north half of the west half of lot No. 33 of said Bane and Wicks' subdivision, excepting so much thereof as was conveyed away by Geo. A. Young prior to 24th March, 1880. The part above conveyed of said north half was conveyed to said corporation by A. W. Jones *et ux* 24th April, 1880, by a deed recorded in said records, in vol. 47, at page 384, and this 17th parcel shall contain as a part thereof all the interest conveyed by said Jones in said deed to said corporation in any other part of said lot 33 of said subdivision. The 18th parcel contains all that part of lot 275 of the latest numeration in said city which was conveyed to said corporation by Mary Degen *et al.* 24th November, 1880, by a deed which is recorded in said records, in vol. 48, at page 98. The 19th parcel is city lot No. 574, of the latest numeration in said city, and was conveyed to said corporation 3rd January, 1881, by John Rigney *et ux*, by deed recorded in the records of said county, in vol. 45, at page 583. The 20th parcel is lot No. 572 of the latest numeration in said city, and was conveyed 8th February, 1881, to said corporation by Bryan Kennedy *et al.* by a deed recorded in vol. 49, at page 14. The 21st parcel is lot No. 511 of the latest enumeration in said city, and was conveyed 22d February, 1881, to said corporation by E. M. Wilson, administrator of Patrick Corrigan, by a deed recorded in the said records, in vol. 48, at page 291. The 22d parcel is the east half of lot No. 580, of the latest enumeration in said city, and was conveyed to said corporation 19th March, 1881, by Christian Ludt *et al.* by a deed recorded in said records, in vol. 49, at page 93. The 23rd parcel is the northwest part of original lot No. 11, as shown by plat of village lots of Youngstown, made by Dr. Henry Manning and recorded in Mahoning County Records of Plats, vol. 1, page 51, bounded as follows: Beginning at the northwest corner of said lot No. 11, thence N. 74½° E., 1 chain to lot owned by M. Fee, and now known as city lot
No. 582, new number; thence south 2 chains 71½ links; thence
49 west 98 links to east line of original lot No. 12; thence N. ½° E., 2 chains 44½ links to the place of beginning, containing about one-fourth of an acre of land, and was conveyed 1st July, 1881, to said corporation by Thomas George *et ux.* by a deed recorded

in said records in vol. 49, at page 392. The 24th parcel is the west half of lot 580 of the latest enumeration in said city, and is the same land which was conveyed to said corporation 1st July, 1881, by Catherine Scanlon *et al.* by a deed recorded in said records, in vol. 49, at page 392. The 25th parcel is part of a larger parcel of ground conveyed to John Stambaugh, trustee, by W. S. Parmelee, trustee, 31st July, 1871, by a deed recorded in said records, in Deed Book 31, at page 273 *et seq.*, and is bounded and described as follows: Beginning on the east line of said larger parcel at the middle of a stone monument standing at the northwest corner of a piece of ground conveyed by the Liberty and Vienna Railroad Company to the Ashtabula, Youngstown & Pittsburgh Railroad Company by a deed dated 25th August, 1871, and recorded in said records, in vol. 33, at page 463 *et seq.*; thence running along the east line of said larger parcel conveyed, as aforesaid, by W. S. Parmelee, trustee, N. 30° 28′ E., about $398\frac{7}{10}$ feet to a stone monument at a point 15 feet southerly from the line of high water mark, on the south side of the Pennsylvania and Ohio canal; thence along a line parallel with and distant 15 feet southerly from the said line of high-water mark on the south side of said canal N. 49° 44′ W., about $135\frac{3}{4}$ feet to a point which, measured along a line perpendicular to the east line of Market street, is distant easterly 150 feet from the east line of Market street; thence along a line parallel with and distant 150 feet easterly from the east line of Market street S. 31° 20′ W., about $421\frac{2}{10}$ feet to the north line of said ground conveyed, as aforesaid, to the Ashtabula, Youngstown and Pittsburgh Railroad Co., and thence along the said north line of land conveyed to said railroad company S. 59° 2′ E., about $139\frac{7}{10}$ feet to the beginning, containing 1 acre and $\frac{28388}{100000}$ of an acre of land, and is the same land conveyed to said corporation by John Stambaugh, trustee, *et al.*, 14th July, 1881, by a deed recorded in said records in vol. 50, at page 66 *et seq.* The 26th parcel is the east end of out-lot No. 2, in said city, contains about 3 & $\frac{2}{1000}$ of an acre of land, and is the same land conveyed to said corporation 30th July, 1881, by Edwin Bell *et al.* by a deed recorded in said records in vol. 50, at page 63 *et seq.*, which deed is here referred to for a more particular description of said last-named parcel. The 27th parcel is lot No. 576 of the latest enumeration in said city and was conveyed to said corporation 16th November, 1881, by Mary Kelly, by a deed recorded in said records in vol. 51, at page 34. The 28th parcel is the east part of lot No. 575 of the latest enumeration in said city, and bounded as follows: Beginning at the northwest corner of lot No. 574, on the south line of the Pennsylvania and Ohio canal, thence in a westerly course, parallel with the south line of said lot No. 575, 25 feet; thence south, parallel with the west line of lot No. 574, to the north line of lot No. 573; thence east along the north line of said lot 573 25 feet to the southwest corner of said lot No. 574, and thence north along the west line of lot No. 574 to the place of beginning, and was conveyed to the said corporation 25th November, 1881, by Mary Joice *et al.* by a deed recorded in said records in vol. 51, at page 63. The 29th parcel is the west part of lot No. 575 of the latest

enumeration in said city, situated on the south side of the Pennsylvania and Ohio canal, bounded on the north by the towing path of said canal, on the east by the east part of said lot No. 575, which said east part was conveyed by Charles Gillen to Mary Kelley; on the south by lots 573 and 577, and on the west by lot 576, and was conveyed to said corporation 2d December, 1881, by Michael Connors *et al.* by a deed recorded in said records in vol. 51, at page 90; also all the right, title, and
51 interest of the party of the first part in and to that lot of land on the northeast corner of Bane and Champion streets, in said city of Youngstown, on which stands the new brick office recently erected by it; also all the other lands and rights in lands in the said city of Youngstown owned by said party of the first part as a part of its iron manufacturing works therein, saving the reservations and exceptions hereinafter written; also all the right, title, and interest of the party of the first part in and to those two certain parcles of ground in the township of Poland, in said county, one of about 29 & $\frac{49}{100}$ acres and one of about 2 & $\frac{3}{100}$ acres, known as the Struthens furnace property, lately purchased by contract by the party of the first part from Thomas Struthens *et al.* and now in its possession, and in the blast furnace and all buildings, structures, fixed machinery, and other fixtures thereon, saving and reserving, nevertheless, out of and from the above conveyance all that part of the 29 parcels first above named which was conveyed by the party of the first part to the N. Y., P. and O. Railroad Company as a right of way for its railroad, and all that part of the residue of said 29 parcels which lies north of the land so conveyed to said railroad company, and also reserving and excepting all the rights in and all parts of all the said first named 29 parcels of land which were reserved and excepted to the respective grantors in all of the deeds to the party of the first part above named, and this conveyance is made subject to the stipulations in all of said deeds contained:

To have and to hold all and singular the premises aforesaid, but subject to the reservations above named, unto the said parties of the second part as joint tenants and not as tenants in common,
52 and to the survivor of them and to his heirs and assigns forever, but nevertheless in trust to secure the payment, according to their tenor and to the successive holders and owners thereof of each of said bonds and of each of said interest coupons thereto, attached, and upon the further trusts and conditions following and subject to the powers and agreements hereinafter named, and it is expressly covenanted and agreed between the parties of this indenture as follows—that is to say:

First. That the said bonds shall be certified by the parties of the second part according to the form of certificate above named, and until so certified shall not become secured hereby; that until default shall be made by the party of the first part in the payment, pursuant to the terms thereof, of the principal or interest of any of said bonds, and so long as the party of the first part shall well and truly perform all its covenants contained in said bonds and in this indenture, it shall remain in the quiet and peaceable possession, use, enjoy-

ment, and control of all the property hereinbefore conveyed, and if it shall well and truly pay, according to the tenor thereof, each and every one of said bonds, with all the interest thereon, and if it shall also at all times keep and perform all its other covenants and agreements herein contained, or if in case of any default by it in the performance of any of its said other covenants and agreements it shall, within thirty days after receiving notice thereof either from the parties of the second part or their survivor or their successors in the trust, fully repair such default, then this indenture and all the right, title, and estate hereinbefore conveyed shall become and remain void and of no effect, but otherwise be in full force and virtue.

53 Second. That so soon as the party of the first part shall, in accordance with the terms of its said contract with said Struthers and others, become seized of the legal title of said Struthers' furnace property it will, upon request of the parties of the second part, or the survivor, convey the same to them upon the same trusts herein contained.

Third. That the party of the first part will, so long as any of said bonds or the interest thereon may be outstanding and unpaid, keep all of the said conveyed property in good and reasonable repair and condition; will cause all taxes thereon to be promptly paid, and will neither do nor suffer to be done any act whereby the lien hereby created shall be impaired, subject, however, to its right hereinbefore reserved to use and employ said property in the ordinary manner; and it further hereby agrees to pay all of said bonds and the interest warrants attached according to their true tenor.

Fourth. That while any of said bonds or interest remains unpaid the party of the first part will keep insured in good and responsible companies against loss or damage by fire all such of the inflam--able part of the property hereby conveyed as shall be reasonably insurable in an aggregate sum not less than two hundred thousand dollars, if so much insurance can be obtained, such insurance to be made and kept payable to the parties of the second part as trustees herein, but the money received by the trustees in case of loss or damage by fire on account of such insurance shall, upon the request of the parties of the first part, be applied by the parties of the second part to the repairing, replacing, or rebuilding under the joint direction and control of both parties the property so damaged or destroyed.

Fifth. That the lien hereby created shall not in anywise

54 be lessened or impaired by reason of the additional security for the payment of said bonds as named in the said bonds.

Sixth. That in case of a foreclosure of the lien hereby created the avails of the property sold, first deducting costs and a reasonable compensation to be paid to the parties of the second part herein, shall be applied to the payment of all said bonds then remaining outstanding and unpaid, without preference to any because of difference in the time of maturity, but in such case all of the matured interest coupons on all outstanding bonds shall be paid before payment of any part of the principal.

Seventh. That the party of the first part further covenants and

agrees that it has hitherto never executed any mortgage or other conveyance creating any lien or incumbrance on any of the above-conveyed lands.

In testimony whereof the party of the first part has caused its corporate seal to be hereto affixed and these presents to be subscribed by its president and secretary and the parties of the second part, in token of their acceptance of the trusts hereby created, have hereunto set their hands and seals on the day first above written.

HERBERT C. AYER, *President.*
A. W. JONES, *Secretary.*

Signed, sealed, acknowledged, & delivered in presence of—
F. H. MATHEWS,
S. B. GOODALE,
As to H. C. Ayer.
SIDNEY STRONG,
WILLIAM R. MURRICK,
As to A. W. Jones.
[Brown, Bonnell & Company Seal.]

55 THE STATE OF NEW YORK, } ss:
County of New York, City of New York, }

Before me, a commissioner of deeds for the State of Ohio, residing in said city & county, duly commissioned, personally came Herbert C. Ayer, president of the corporation Brown, Bonnell and Company, and acknowledged that as president of said corporation he subscribed the foregoing indenture, and that his execution thereof and the affixing of the common seal of the corporation thereto was done by direction of a resolution of the board of directors, and that the foregoing indenture was his free act and deed as such president and the free act and deed of the said corporation.

Witness my hand and official seal on this 16th day of June, anno Domini 1882.

[SEAL.] S. R. GOODALE,
Commissioner for Ohio, Resident in New York City.

THE STATE OF OHIO, } ss:
Mahoning County, }

Before me, a notary public within and for said county, personally came A. W. Jones, secretary of the corporation Brown, Bonnell & Company, and acknowledged that as such officer he subscribed his name to the foregoing indenture and affixed thereto the common seal of the said corporation, and that the same was his free act and deed as such officer and the free act & deed of said corporation; and, being sworn, he says that what purports to be the common seal of the said corporation -hereto affixed is the genuine corporate seal thereof, and was affixed to said indenture by him by order of the board of directors of said corporation.

Witness my hand and seal notarial on this 14th day of June, anno Domini 1882.

[SEAL.] WILLIAM R. MERRICK,
Notary Public.

56 [Endorsed:] No. 4195. United States circuit court, northern district of Ohio. Lake Superior Iron Co. *et al. vs.* Brown, Bonnell and Company. Answer and cross-bill of Commercial National Bank, Dan. P. Eells, Charles A. Otis, William H. Harris, John Hay, & Samuel Mather, ex'rs, and Dan. P. Eells & John Hay, trustees. Filed Dec. 1, 1883. A. J. Ricks, clerk U. S. circuit court.

57 Circuit Court of the United States, Northern District of Ohio.

LAKE SUPERIOR IRON CO. and Others
against
BROWN, BONNELL & CO. } In Equity.

In the matter of the claim of Dan. P. Eells and John Hay, trustees, and the Commercial National Bank, Charles A. Otis, William H. Harris, Dan. P. Eells, and John Hay and Samuel Mather, as executors of the Estate of Amasa Stone, deceased.

The respondents, The Manufacturers' and Traders' Bank of Buffalo, New York, The First National Bank of Youngstown, The Second National Bank of Youngstown, The Sharon National Bank, Charles S. Worden, The Florence Mining Company, Wesherman, Filer & Co., Andrews & Hitchcock, & Brior Hill Iron & Coal Co., in behalf of themselves and all other creditors of the defendant, Brown, Bonnell & Co., who may choose to avail themselves of this response, make answer unto the said claim aforesaid and say—

They admit the execution and delivery of the mortgage by Brown, Bonnell & Co. to John Hay and Dan. P. Eells, trustees, in manner and form as is alleged.

They further admit that the Commercial National Bank claim to hold $150,000 of the bonds purporting to be secured by such mortgage to secure a claim it holds against the said defendant and Dan. P. Eells, Charles A. Otis, William H. Harris, and John Hay and Samuel H. Mather, as executors of the estate of Amasa Stone,
58 deceased, each claim to hold $80,000 of the bonds purporting to be secured by such mortgage as collateral to the claims held by them respectively.

The respondent, The Manufacturers' & Traders' Bank of Buffalo, N. Y., shows that it did on the — day of ——, 1883, by the consideration of the circuit court of the United States for the northern district of Ohio, duly recover a judgment at law against Brown, Bonnell & Co. for $—, which still remains in full force, unreversed, and wholly unpaid.

The other respondents admit that they are, together with divers other persons and corporations, judgment creditors of the defendant corporation, by virtue of judgments duly entered in the common pleas court of Mahoning county, Ohio, and the dates and amounts of all such judgments and the names of the judgment creditors are all fully set forth in a schedule attached hereto, which these respondents pray may be taken as a part of their pleading.

And thereupon these respondents aver that, except the judgment recovered in this court and the several judgments recovered in the

said State court, there are no judgments of any kind existing against said Brown, Bonnell & Co., and that said corporation is the owner in fee simple absolute of a large and valuable manufacturing property in said county of Mahoning and State of Ohio, consisting of real estate, blast furnaces, rolling mills, coal mines, machinery, equipment, and appurtenances, worth fully one million dollars, and that each and every of the judgments aforesaid, from the date of its recovery, became and still is a lien upon all and singular such real estate, paramount and superior to the claim of the said John Hay and Dan. P. Eels, trustees, or to the said alleged mortgage.

59 These respondents further show that the said "Brown, Bonnell & Co." is a corporation organized under the laws of Ohio regulating the incorporation of manufacturing companies, and that it has been organized for about twenty years, during all which time it has been engaged actively in the manufacture and sale of iron, and has become the owner of the largest plant and trade of any establishment of the kind in the West. In order to carry on its trade successfully, it was obliged to use its credit in the purchase of the large supplies which it was constantly procuring and in the discount of the paper it received for its product, and during the entire period of its existence, from the origin thereof down to February —, 1883, it had never had any mortgage or other incumbrance on its property and never had issued any bonds, and, in consequence thereof, it had been enabled to command almost unlimited credit with banks and ore, coal, and supply firms.

These respondents further show that continuously from January, 1882, to January, 1884, Dan. P. Eells, Charles A. Otis, and William H. Harris were large stockholders in and were directors of the said Brown, Bonnell & Co. Amasa Stone was a large stockholder in the corporation and has been a director previous to 1882; and the said Eells, Otis and Harris, and Stone were large stockholders and officials of the Commercial National Bank of Cleveland.

These respondents aver that the said mortgage and bonds were never authorized by any vote of the stockholders of Brown, Bonnell & Co. and were never submitted to any meeting of stockholders, and some of the stockholders did not even know of its existence

60 until after this action was instituted and a receiver appointed.

The only authority for the execution of said bonds and mortgage was the passage of a resolution of the board of directors of the corporation on April 3, 1882, a copy of which is hereto attached and marked Exhibit "A," and altho' it is by said resolution recited that it was intended to "negotiate" $500,000 coupon bonds, in truth and fact it was understood and agreed by the directors of the corporation that in order to preserve to the fullest extent the then existing credit of the corporation that it would not "negotiate" any of such securities, but that they would conceal the existence of any such incumbrance, and that the said mortgage should not be recorded and the bonds should only be used as collateral with directors and others who could be safely trusted not to disclose the existence of the incumbrance, and that by such means the credit of the corpora-

tion could be maintained during the period of depression which was taking place in the iron trade.

The said Eells, Hay, Stone, Harris, Otis, and the Commercial National Bank all understood and concurred in this arrangement, and it was distinctly agreed with the Commercial National Bank and said Stone as late as December, 1882, that unless the said Brown, Bonnell & Co., or its sales agent, John V. Ayer's Sons, should become involved so as to threaten a suspension of payment that the said mortgage should remain unrecorded and its existence concealed from all persons having dealings with Brown, Bonnell & Co.

61 Your respondents claim that this scheme was fraudulent as to creditors and was devised to give such corporation a fictitious credit by holding out to those dealing with it that it was possessed, as it always theretofore had been, of a large amount of unincumbered property, and by concealing such mortgage and keeping the same from record the corporation induced your respondents and other creditors to make loans and sell supplies on credit, which they would not have done if they had been cognizant of the real state of facts.

Your respondents show that, although the said mortgage was authorized by the board in April, 1882, and was delivered to the trustee Eells shortly after its execution, it was not recorded until February 19th, 1883, and was then recorded solely in consequence of a telegram from the sales agent, John V. Ayer's Sons, of that day, announcing their failure, and on said date the said Eells well knew that the said Brown, Bonnell & Co. would also be forced to suspend payment.

Your respondents aver that during the period intervening between April 3rd, 1882, and February 19th, 1883, when such false credit was created by the fraudulent concealment of said mortgage, the said Brown, Bonnell & Co. created the entire body of its liabilities, which are now outstanding and unpaid.

These respondents aver that it is contrary to equity that the parties to such a fraud on creditors, and, being themselves stockholders and directors of said corporation and the said bank, of which they are also officers, be allowed to claim a priority over other creditors by reason of the record of a fraudulent and long-concealed mortgage when the corporation was in a failing condition, as they then well knew.

62 These respondents therefore claim that the said mortgage and bonds ought to be declared fraudulent and void as to creditors and the said bonds ordered to be delivered up and destroyed, and the due rights and priorities of these respondents, as judgment creditors having lawful liens and priorities on said property, should be declared and protected by the court as they may be adjudged.

(Signed) A. W. JONES.
WILLEY, SHERMAN & HOYT, *Solicitors.*

H. CRAWFORD, *Counsel.*

63 [Endorsed:] 4195. Circuit court of the U. S., northern dist. of Ohio. Lake Superior Iron Company *et al. vs.* Brown, Bon-

nell & Co. Response of divers creditors to petition of Commercial National Bank and others. Filed Mar. 1, 1884. A. J. Ricks, clerk U. S. circuit court.

64 In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THURSDAY, *September 24th*, 1885.

Present: The Honorable John Baxter, circuit judge.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } Chancery. No. 4195.

In the matter of the exceptions of the Leadville Coal Company and others to the report of the special master on the intervening petition of the Commercial National Bank and others.

This cause, having come on to be heard upon the exceptions to the report of the special master filed herein on May 2d, 1885, was argued by counsel, and thereupon, upon consideration, the court, being of the opinion that the directors of the defendant corporation and said Commercial National Bank of Cleveland, Ohio, under the facts set forth in said report, which the court finds to be true, did not acquire a lien or priority under said mortgage over other creditors, doth order, adjudge, and decree that the exceptions to said report be sustained and said report be set aside and that said intervening petition, so far as it seeks to maintain a lien and priority in favor of the interveners over other creditors under said mortgage therein set forth, be dismissed, but be retained for such further relief and protection as said interveners may be entitled to in this cause, and that the matter of costs of this hearing and proceeding be reserved for further order of the court.

And, counsel interested in this proceeding having agreed
65 that five hundred dollars will be a reasonable compensation to said special master, A. J. Ricks, for his services in this cause, it is ordered that the receiver pay to said master said sum out of the funds now in his hands, together with the further sum of $97.90 due the stenographer for reporting the testimony on this reference.

66 United States Circuit Court, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY.

Upon the motion of the complainants herein, the merits thereof having been fully considered, it is ordered and decreed that Augustus J. Ricks be, and he is hereby, appointed a special master of this court, on account of his experience in matters of accounting, to hear and determine the rights of the several creditors of the de-

fendant, who, in accordance with a former order of this court herein made, have filed their claims with the clerk thereof, and the said Augustus J. Ricks, as such master, is ordered to take an account from the pleadings now in this cause and such other pleadings as may be filed with him as such master and from such proofs as may be produced before him on giving the usual notice, and to ascertain what is justly due from said defendant to each and every creditor who has filed his claim in accordance with the said order of the court, and to adjudge and marshal the liens of said creditors and the priorities thereof, and to report his findings and determinations and adjudications to this court; and in performance of this order the said master shall have power to order the filing of proper pleadings before him and to compel the attendance of witnesses; and he is hereby vested with all powers conferred upon masters by the rules of the court and is authorized to employ a stenographer to take testimony in all proper claims.

67 [Endorsed:] 4195. Decree appointing A. J. Ricks sp. master. July 17th, 1883. 13–198.

68 In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON COMPANY
vs.
BROWN, BONNELL AND COMPANY.
} Equity. No. 4195.

To the honorable the judges of the circuit court:

At the April term, A. D. 1883, this cause was referred to the undersigned, as a special master, "to ascertain what is justly due from said defendant to each and every creditor who has filed his claim in accordance with the order of this court, and to adjudge and marshal the liens of said creditors and the priorities thereof, and to report his findings and adjudications to the court," &c. In accordance with this order I caused, in each case in which the receiver made any contest as to the amount due upon the petition of the creditors, proper pleadings to be filed, and upon the issues so made I have heard such testimony as the parties produced, and made in every such case a special report as to the amount allowed, with reasons for such findings. I have made special reports of this character in the following cases, viz:

The Florence Mining Company, claim No. 84.
Henry O. Bonnell *et al.*, claim No. 131.
Job Evans, claim No. 164.
The Iron Cliff Company, claim No. 170.

And I hereby make special reference to the reports made in those cases and ask that the same be considered as a part of this my
69 general report. In very many other claims, after comparing the proofs filed by the petitioners with the books of the defendants and records on file in this office, I was enabled to reach a conclusion satisfactory to the creditor, to the receiver representing the defendants, and to me, and in such cases I have not filed any

special report, but made a finding of the amount on the schedule hereinafter referred to.

In the claims of the following petitioning creditors, viz:
W. R. Erret, No. 71;
The Pittsburgh and Lake Erie R. R. Co., No. 92;
The Citizens' National Bank of Pittsburgh, Pa., No. 114;
The Imperial Coal Company, No. 122;
The Pittsburgh Steel Casting Company, No. 49;
liens are claimed by attachment proceedings instituted and still pending in the courts of the United States and of the State of Pennsylvania in the latter State. As the result of such proceedings has not been proved and the validity of said liens established, I am not able to report any priority as existing in favor of said creditors.

In the claims of the following creditors, viz:
Commercial National Bank of Cleveland, No. 90;
Daniel P. Eells, No. 95;
William H. Harries, No. 96;
Charles A. Otis, No. 145;
Amasa Stone's Estate, No. 157;
they claim to hold as collateral security bonds secured by a first mortgage upon all the property of the defendants. The validity of this mortgage is contested by other creditors, and
70 upon the issues so made, by an order of your honors, I was required to pass upon the questions so made; but by consent of all parties, pending negotiations amongst the creditors for a settlement of all these matters, I have, by such consent of all parties, suspended further hearing as to the validity of said mortgage, and in the schedule hereinafter referred to I have noted their claims as to liens without passing upon them.

In the following cases I have reported preferred claims, viz:

No. 67, Wilcox & Scaife for	$232 39
No. 123, Charles L. Mackey	14 60
No. 124, James Mackey	811 50

As to all other claims, the amount claimed by the creditor, with the amount allowed by me, the nature of the claim, the number thereof, and the residence of the petitioners is fully set forth in "Schedule A," which is submitted herewith as a part of this report, and to which reference is made for full information as to each claim so filed.

From said schedule it appears that the total claims filed by petitioning creditors, number one hundred and seventy-seven, amount to the sum of	$1,309,903 48
The amount reported due by me upon said claims is	1,235,819 40
The amount of interest on same to June 1st, 1884, allowed is	84,830 82
Total amount of principal and interest allowed	$1,320,649 92

Said schedule and the said several special reports made by
71 me as aforesaid, together with all the evidence taken in connection therewith, are respectfully submitted herewith for the examination of the court and its further orders herein.

(Signed) A. J. RICKS,
Special Master.

72 [Endorsed:] No. 4195. United States circuit court, northern district of Ohio, eastern division. Lake Superior Iron Co. *et al. vs.* Brown, Bonnell and Company. Report of special master. Filed June 11, 1884. A. J. Ricks, clerk U. S. circuit court.

(See table marked pages 73, 74, 75, and 76.)

77 In the Circuit Court of the United States, Eastern Division, Northern Division [District] of Ohio.

LAKE SUPERIOR IRON COMPANY
vs.
BROWN, BONNELL & COMPANY.
} Equity. No. 4195.

Supplemental Report of Master.

Since filing my report as master as to the sums due to the various creditors of Brown, Bonnell & Co., certain creditors have admitted certain payments to have been made by their having realized upon certain assets and judicial proceedings since the filing of said report, which I embrace in this report, viz:

I. The Fayette County National Bank of Pennsylvania, upon their claim No. 111 filed herein, have admitted, through their attorney, that on the seventh day of March, A. D. 1884, they received through C. C. Sterling, sheriff of Fayette county, Pennsylvania, as the proceeds of a sale of property made under judicial proceedings in said county, the sum of twenty-four thousand one hundred and sixty-four and $\frac{59}{100}$ dollars ($24,164.59). The evidence of such payment having been made has been submitted to me this day (Jan'y 9th, 1885) by Fayette Brown, receiver, and has been filed with the claim above named and numbered. The evidence of the said credit was not sent to said receiver until long after the filing of my report, al-
78 though the credit is dated prior thereto. The amount due and reported in favor of said claimant in my original report, with interest to June 1st, 1884, was $77,424.95. Upon this sum the above-named credit of $24,164.59, with interest from March 7th, 1884, should be applied so that the sum originally reported should be reduced to the sum of $24,502.89, being principal and interest of the credit, which would leave the amount due said bank on June 1st, 1884, at $52,922.06.

II. The claim of the Pittsburgh and Lake Erie Railroad Co., No. 92, should be reduced from the amount reported in my general report as due June 1st, 1884, by the sum of $289.91, which the claimant received on the 18th day of November, 1884, by virtue of certain legal proceedings in the court of common pleas of Allegheny Co.,

Pennsylvania, from the Pennsylvania Railroad Co., as garnishee, on a claim due from said company to Brown, Bonnell & Co. The sum reported due on June 1st, 1884, to the claimant was $5,929.55. From this sum should be further deducted the above credit of $289.91, with interest from Nov. 18th, 1884. See receipt filed with original claim.

III. The Second National Bank of Youngstown, O., claim No. 53, since the filing of my general report, has been reduced by a payment thereon of $2,300 on November 1st, 1884. Part of the claim of said bank was a check dated Feb'y 16th, 1883, drawn by Brown, Bonnell & Co. on the Citizens' National Bank of Pittsburgh, Pennsylvania, payable to the order of the Mahoning Coal Co. The said Mahoning Coal Co. paid said check on the day named, viz., Nov. 1st, 1884, out
of that part of its earnings due Brown, Bonnell & Co. as one
79 of the owners of said mine, as duly appears by the receipt of
H. M. Garlick, cash'r of the Citizens' National Bank aforesaid, and which I have filed with its original claim. The claim as allowed was $15,713.88, which should be reduced by said sum of $2,300 and interest.

All of which is respectfully submitted.

(Signed) A. J. RICKS, *Master.*

80 [Endorsed:] No. 4195. Lake Superior Iron Co. *vs.* Brown, Bonnell & Co. Supplemental report of master. Filed Jan. 13, 1885. A. J. Ricks, clerk U. S. circuit court.

81 *Report of Fayette Brown, Receiver of Brown, Bonnell & Co., of Assets & Liabilities December 31, 1886.*

Assets:		
Inventory of Dec. 31, 1885—Manuf'd iron, nails, pig-iron, scrap iron, old rails, fuel, and other materials and supplies; iron at 1.50 and nails at 2.10 rates at Youngstown; iron at Chicago 1.55 rates		430,814 97
Cash on hand and in bank		9,582 51
Bills receivable, good and available		120,629 05
Accounts receivable, " " "		142,666 69
Insurance, prepaid premiums		3,164 75
New machinery		2,112 96
Notes and accounts due on account of receiver's business, suspended and doubtful		5,718 70
Notes and accounts due on acc't of receiver's business, business in a receiver's hands, but claims said to be good		26,336 68
Notes and accounts for sales made by B., B. & Co. before failure, not on acc't of receiver's business, bad or doubtful		13,766 86
		$754,793 17
Liabilities:		
Bills payable, receiver's notes	130,003 79	
Accounts payable	71,603 79	
Treasurer of Mahoning Co., taxes of 1885	7,025 68	
Treasurer of Mahoning Co., deposited with receiver, being dividends on stock owned by B., B. & Co., pledged by B., B. & Co. for money borrowed, await-		

ing decision of court as to its disposition; will either be turned in to receiver or applied upon the claim against B., B. & Co.	15,862 27	
		224,495 53
		$530,297 64
Deduct amount of like assets received from estate of B., B. & Co. Feb. 21, '83, to Dec. 31, 1885	292,119 31	
Less amount paid by receiver for account B., B. & Co.'s debts by order of court	114,065 96	
		178,053 35
Leaves balance of apparent gain by receiver, Feb. 21, 1883, to Dec. 31, 1885, of		$352,244 29

E. & O. E.

FAYETTE BROWN,
Receiver of Brown, Bonnell & Co.

82 LAKE SUPERIOR IRON COMPANY *et al.* *vs.* BROWN, BONNELL & COMPANY. } Equity. No. 4195. Decree.

At this February term, A. D. 1886, this cause came on to be heard upon the pleadings, the reports of the special master in this cause as confirmed by the court, the reports of the receiver of this court, exhibits, and testimony, and was argued by counsel; on consideration whereof the court find that the defendant is a corporation organized under the laws of the State of Ohio, and was at the time of the appointment of the receiver herein insolvent, and that ever since such time it has remained as [and] is now insolvent, and that the equity of the case is with the complainants herein, and that complainants, on their own behalf and on the behalf of all other creditors of said defendant who have proved their claims herein, are entitled to the relief against said defendant in said original and amended bills prayed for; and the court further find that the said defendant, Brown, Bonnell & Company, is indebted to the several persons and corporations named herein below in the amounts stated, which amounts include interest to the first day of June, A. D. 1884, and which amounts are entitled to draw interest at the rate of six per cent. per annum from that date.

83	1	Upson, Walton & Co., Cleveland, O.	43 45
	2	Wm. Tod & Co., Youngstown, O.	196 87
3		Niagara Refining Co., Buffalo, N. Y.	107 26
4		Carbon Limestone Co., Youngstown, O.	1,209 90
5		Moravia Limestone Co., "	36 09
6		Greenville National B'k, Greenville, Pa.	10,384 49
7		McVay & Walker, Braddocks, Pa.	29 46
8		B. F. Parsons, Johnsonville, Pa.	31 79
9		Sharon National Bank, Sharon, Pa.	108,358 00
10		H. C. Frick Coke Co., Pittsburgh, Pa.	784 68
11		B. F. Goodrich Co., Akron, O.	18 05
12		Cleveland Malleable Iron —, Cleveland, O.	34 90

13	Girard Savings Bank, Girard, O.	5,810 09
14	Otis Iron & Steel Co., Cleveland, O.	1,481 94
15	Taylor Iron Co., "	12,812 03
16	Merchants' National Bank, Meadville, Pa.	35,044 70
17	A. D. Truesdell, Warren, O.	12 72
18	Brush Electric Co., Cleveland, O.	518 43
19	John Carlin & Co., Pittsburgh, Pa.	614 80
20	Robinson, Rea & Co., "	216 90
21	Cameron, Amberg & Co., Chicago, Ill.	4 50
22	Westerman, Filer & Co., Sharon, Pa.	1,506 90
23	Pendleton Bros. & Co., Rochester, Pa.	563 60
25	Leadville Coal Co., Youngstown, O.	12,276 92
26	New York, Pa. & O. R. R. Co.	3,778 64
27	Sam'l Osborne & Co., Boston, Mass.	137 78
28	Edward H. Kellogg, New York, N. Y.	782 05
29	Allegheny Coal Co., Youngstown, O.	162 20
30	Chalmers Spence Co., New York, N. Y.	205 42
31	Alberta Coal Co., New Lisbon, O.	266 39
32	S. Obermeyer & Co., Cincinnati, O.	93 59
33	A. Garrison & Co., Pittsburgh, Pa.	213 17
34	Wm. Liggett, Lowellville, O.	37 91
35	Jos. C. Brenneman, Youngstown, O.	543 27
36	First National Bank, Garrettsville, O.	6,202 24
37	Jno. B. Vinton, Youngstown, O.	594 36
38	Shenango Coal Co., "	20,353 60
39	Short & Forman, Cleveland, O.	41 95
40	Woods, Perry & Co., "	645 85
41	W. H. Rickey, Cincinnati, O.	23 17
42	Sharon Coal Co., Sharon, Pa.	320 48
43	P. Jacobs & Sons., Youngstown, O.	4,849 05
45	Lowell Limestone Co., Lowellville, O.	2,362 94
46	Adams & Westlake M'f'g Co., Chicago, Ill.	48 11
47	Brier Hill Stone Co., Brier Hill, O.	23 70
48	Rossie Iron Works, New York, N. Y.	9,087 05
49	Martin Quigley, Erie, Pa.	3,586 05
	50 Joseph H. Davis, Sewickley, Pa.	21 77
84	51 A. Armstrong, Warren, O.	7 10
	52 David Jones, Youngstown, O.	1,134 57
53	Second National B'k, Youngstown, O.	13,413 88
54	First National B'k, Youngstown, O.	52,908 56
56	Parke Bros. & Co., Pittsburgh, Pa.	149 03
57	Standard Oil Co., Youngstown, O.	382 81
58	Atwood & McCafferty, Pittsburgh, Pa.	9 23
59	R. L. Walker, Poland, O.	10,619 06
60	Edwin Bell & Sons, Youngstown, O.	1,222 82
61	Youngstown Water Works, "	51 03
62	Foster Coal Co., "	2,648 44
63	Andrews & Hitchcock, "	21,826 25
64	John Cannon, Coaltown, Pa.	148 05
65	J. W. Outhwaite & Co., Cleveland, O.	1,004 74

66	Nelson P. Reed & Co., Pittsburgh, Pa.	3 97
67	Wilcox & Scaife, "	232 39
68	Milliken, Boyd & Co., Youngstown, O.	233 69
69	Electrical S'ply Co., Ansonia, Conn.	392 37
70	United Pipe Lines, Oil City, Pa.	354 39
71	W. R. Everett, Allegheny, Pa.	18,242 10
72	Hunrod Furnace Co., Youngstown, O.	10,568 87
74	Geo. D. Wick, Cleveland, O.	15,232 86
75	Chas. Storer, North Hope, Pa.	125 46
76	H. L. & E. A. Schwertzenburg, Cleveland, O.	177 55
77	Brooks Oil Co., "	48 11
78	Jno. S. Williams, Youngstown, O.	19,811 76
79	Hartley & Marshall, Pittsburgh, Pa.	3,456 31
80	Crocker Bros., New York city	212 23
81	Philip Stewart & Co., Mercer, Pa.	62 82
82	Menominee Mining Co., Milwaukee, Wis.	3,021 88
83	B. F. Rafferty, Pittsburgh, Pa.	197 25
84	Florence Mining Co., Milwaukee, Wis.	61,715
85	Witch Hazel Mining Co., Youngstown, O.	1,112 69
86	Park & Westlake, "	283 76
87	First National Bank, Mercer, Pa.	11,366 37
88	Meyer & Lowenstein, New York, N. Y.	85 25
89	McMillan Oil Co., Cleveland, O.	410 49
90	Commercial National Bank, Cleveland, O.	63,720 88
91	American Nail & Mach. Co., Ashtabula, O.	12 38
92	Pittsburgh & L. E. R. R. Co.	5,639 64
93	Lorenzo Lane, Youngstown, O.	6,927 15
94	McIntosh, Hemphill & Co., Pittsburgh, Pa.	426 15
95	Dan. P. Eells, Cleveland, O.	40,052 44
96	William H. Harris, "	40,029 18
97	Henry Wick & Co., "	11,790 98
98	J. Parke Alexander, Akron, O.	133 73
99	Wick Bros. & Co., Youngstown, O.	29,208 51
100	Man'f'rs' & Traders' Bank, Buffalo, N. Y.	10,668 63
101	Pratt & Co., "	574 61
102	Pennsylvania Co.	20,772 97
103	A. & W. Powers, Youngstown, O.	1,019 69
104	Hiram Parks, "	5,894 44
105	C. Kane, Pittsburgh, Pa.	494 20
106	National B'k West Va., Wheeling, W. Va.	5,828 47
107	C. M. Roberts, Pittsburgh, Pa.	248 45
85 108	Totton & Co., Pittsburgh, Pa.	693 33
109	Dunbar Coke Co., "	195 96
111	National Bank of Fayette Co., Uniontown, Pa.	52,922 06
112	Port Royal Coal & Coke Co., Youngstown, O.	117 28
113	Citizens' Nat'l Bank, Pittsburgh, Pa.	69,903 43
114	Second National Bank, Ravenna, O.	35,707 66
116	Grangers' S. & Loan Ass'n, Chardon, O.	12,252 28
117	Archroft Man'f'g Co., New York, N. Y.	5 40
118	Savage Fire Brick Co., New Cumberland, W. Va.	159 36
119	D. B. Chambers, Youngstown, O.	962 11

120	Importers' & Traders' Nat'l Bk., New York, N. Y.	50,175	22
121	Imperial Coal Co., Pittsburgh, Pa.	7,696	64
122	W. F. Sanford, Dunbar, Pa.	790	50
123	Preferred claim		
124	" "		
125	Arthur Conway, Erie, Pa.	1,557	59
126	Phœnix Fire Brick W'ks, Pittsburgh, Pa.	589	62
127	H. Loomis & Co., "	1,307	48
128	Hubbard Nat'l B'k, Hubbard, O.	12,008	40
129	Jackson Iron Co., Cleveland, O.	12,069	69
130	Lake Superior Iron Co., "	13,152	52
131	H. O. Bonnell *et al.*, Youngstown, O.	1,034	90
132	Wm. B. Conway, Warren, O.	118	95
133	American Man'f'r, Pittsburgh, Pa.	53	74
134	Warren Iddings, Warren, O.	118	95
135	Republic Iron Co., Cleveland, O.	41,064	25
137	Cartwright, McCurdy & Co., Youngstown, O.	97	90
138	First National Bank, Bellaire, O.	5,998	97
139	Goeppinger & Resch, Youngstown, O.	17	36
140	Stanbaugh, Thompson & Co., "	7	21
141	Morris Hardware & Co. "	33	55
142	J. H. Bushnell, "	2	04
143	A. B. Brownlee & Co., "	6	46
144	Nicholas Frech, "	81	84
145	Ellis Planing Mill Co., "	40	16
146	Wick C. Gaus, "	19	05
147	Geo. H. Dingley, "	13	57
148	Robert Hunter & Co., "	54	
149	Pittsburgh Steel Casting Co., Pittsburgh, Pa.		
150	Cleveland Rolling Mill Co., Cleveland, O.	599	70
151	Dillinger & Co., West Betheny, Pa.	28	80
152	Lang & Davidson, Pittsburgh, Pa.	1,284	64
153	L. S. & M. S. R. R. Co.	614	75
154	Wheatland Besimer Steel Co., Pittsburgh, Pa.	195	30
155	Chas. A. Otis, Cleveland, O.	53,208	33
156	Alexander & Co., Allegheny, Pa.	278	42
157	Amasa Stone, Cleveland, O.	40,049	27
158	Brier Hill Iron & Coal Co., Youngstown, O.	11,206	48
159	Manning, McKewn & Co., "	29	18
160	Kirk, Christy & Co., Warren, O.	150	44
161	Jarecki Man'f'g Co., Erie, Pa.	18	49
162	Reed Bros., Dunbar, Pa.	6,127	19
	163 E. W. Powers & Co., Youngstown, O.	8	90
86	164 Job Evans, Youngstown, O.	299	33
	165 Farmers' & Mechanics' National Bank, Mercer, Pa.	11,811	58
166	Farmers' Deposit and Savings Bank, Poland, O.	5,962	71
167	Shenango Machine Co., Sharon, Pa.	22	12
168	American Exchange National Bank, New York, N. Y.	11,419	03

169	Pittsburgh National Bank of Commerce, Pittsburgh, Pa.	11,689 42
170	Iron Cliffs Co., Negaunee, Mich.	1,587 70
171	Third National Bank, New York, N. Y.	3,133 33
172	First National Bank, Warren, O.	18,015 64
173	John Geddes, Liberty, O.	10 78
174	Sidney Strong, Youngstown, O.	171
175	Monongahela Nat'l Bank, Brownsville, Pa.	35,205 49
176	Webb, Hart & Co., Boston, Mass.	423 01

87 And the court further finds that there is now in its possession, by its receiver, Fayette Brown, Esquire, real and personal property of said defendant described as follows:

88 The following-described thirty-two parcels of land, all situate in the county of Mahoning, in the State of Ohio, and described and known respectively as follows:

1st parcel. Part of lot No. 10 in the east division of out-lots in the original town plat of Youngstown, and is bounded as follows: Beginning at a post on the east line of the highway to Gibson's fording and fifteen feet from common water mark in the Pennsylvania and Ohio canal, running thence south on the east line of said road sixteen (16) rods; thence east ten (10) rods; thence north sixteen (16) rods; thence west on the bank of said canal 15 feet from common water mark 10 rods to the place of beginning, containing one acre of land.

The second parcel is also a part of said out-lot No. 10, and is bounded as follows: Beginning at the northeast corner of the first parcel 15 feet from the top water line of the said canal, running thence south 18 rods and 23 links to the Mahoning river; thence eastwardly on the north bank of said river 18 rods and 12 links to a post near the outlet of a ditch; thence north parallel with the east line of the first parcel 16 rods and 21 links to the bank of said canal, and thence on the bank of said canal N. 86½ degrees west 18 rods to the place of beginning, containing about two acres and seventeen perches.

The third parcel is bounded as follows: Beginning at low-water mark on the north bank of the Mahoning river and on the east line of the second parcel, on which stands the Falcon furnace, running thence north on said east line of the second parcel to a stake
89 fifteen feet from the water in said canal; thence eastwardly along the bank of said canal, keeping 15 feet from the water therein, to a point such that if a line were drawn from it southerly parallel with the first-named boundary line of this parcel, so as to meet a line drawn eastwardly along the bank of said river from the place of beginning, there would be contained within said four boundary lines one acre of ground, and said parcel has for its boundary lines the said four described lines.

The fourth parcel is known as part of lot No. 1 in the original survey of the south division of outlets in the town plat of Youngstown, and is bounded on the northerly side by the outer line of the

towing path of said canal, on the easterly side by the highway or street leading to the Mahoning bridge, on the southerly side by the Mahoning river, and on the westerly side by the west line of said lot No. 1, which is also the east line of lands formerly owned by the late William Rayen, deceased.

The fifth parcel is bounded as follows: Beginning at the northwest corner of a lot known as the Phœnix Furnace lot and at a point 15 feet south of the common water mark in said canal, thence running south 29¼ degrees W. 8 chains and thirty-five links to low-water mark on the north bank of the Mahoning river; thence N. 82¾ chains W. 6 chains and 7½ links; thence N. 29¼ degrees E. 3 chains 30½ links; thence N. 60¾ degrees W. 1 chain 89½ links; thence N. 29¼ degrees E. 5 chains 30 links to an iron stake 15 feet south of top water line of said canal; thence S. 73 degrees E. 1 chain 72 links; thence S. 76¾ degrees E. 6 chains 4 links to the place of beginning, containing about 5.924 acres.

90 The sixth parcel is bounded and described as follows: Beginning at a point on the north line of the right of way and lands formerly belonging to the Pennsylvania and Ohio Canal Company where said line is met by the west line of the east half of lot No. 33 of Bane and Wick's subdivision of a part of the south division of out-lots in the town plat of Youngstown, thence running northerly along said west line to the south line of the north half of said lot 33; thence westerly along said south line and parallel with Bane street to the west line of said lot 33; thence northerly along said west line of said lot 30 feet; thence easterly parallel with Bane street to the west line of the east half of said lot; thence northerly along said west line of said east half of said lot 12 feet; thence easterly parallel with Bane street to the east line of said lot 33; thence northerly along said east line of said lot to the south line of Bane street; thence easterly along the south line of Bane street to a point where said south line of Bane street would be met by the production southerly of the east line of Walnut street; thence northerly along the southerly production of said east line and along the east line of Walnut street to the northwest corner of lot No. 21 of said Bane and Wicks' subdivision; thence easterly parallel with Bane street to the northeast corner of lot No. 16 of Bane and Wicks' subdivision; thence easterly along the south line of an alley to the west line of Presque Isle street; thence southerly along said west line last named to the north line of the right of way and lands formerly belonging to said canal company; thence westerly along said north line of said right of way and lands last named to the place of beginning.

91 The seventh parcel is a part of lot No. 252 of the latest numbering of lots in said city, and is bounded as follows: Beginning at the southeast corner of said lot, thence running northerly along the east line thereof 18 feet; thence by a southwesterly course to a point on the south line of said lot distant westerly 45½ feet from the southeast corner of said lot; thence easterly along the south line of said lot 45½ feet to the place of beginning.

The eighth parcel is bounded as follows: Beginning at a point on the east line of Presque Isle street two and one-half degrees west 26

links from the southwest corner of a lot conveyed to Brown, Bonnell & Co. by C. H. Andrews *et al.* by a deed which is recorded in the records of said county, in volume 20, at page 84 *et seq.*, thence running S. 2½ degrees W. along said east line of said street 20 feet; thence S. 81½ degrees east 1 chain and 52 links; thence N. 4 degrees E. 20 feet; thence N. 81½ degrees W. 1 chain and 53 links to the place of beginning.

The ninth parcel is that part of lot No. 33 which was conveyed to Andrews and Hitchcock 2nd of July, 1860, by David Tod, and is bounded as follows: Beginning at a stake on the line between said lot and lot 32 1 chain 68 links S. 29½ degrees W. from the south line of Front street, thence running south 29½ degrees W. 95 links to the canal; thence up said canal 49 links; thence N. 4 degrees E. 1 chain 50 links; thence S. 82¼ degrees east 31 links; thence south 87¾ degrees E. 58 links to the place of beginning.

92 The tenth parcel is that part of out-lot No. 32 of the south-east division of out-lots in the former village of Youngstown which, on the 12th of September, 1859, was conveyed by J. Warner to Andrews & Hitchcock, and is bounded as follows: Beginning at a stake where the west line of said lot 32 meets the berme bank of said canal, running thence north 29½ degrees east 95 links; thence south 85 degrees E. 1 chain 23 links; thence south 28½ degrees W. 80 links; thence south 89 degrees W. 1 chain 30 links to the place of beginning.

The eleventh parcel is the south part of city lot No. 281 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presque Isle street 2½ degrees W. 2 chains 78¼ links from the southeast corner of Front and Presque Isle streets, thence running along the east line of Presque Isle street south 2½ degrees W. 26 links; thence 79¾ degrees E. 1 chain 53 links; thence north 4 degrees E. 21 links; thence north 77 degrees W. 1 chain 55 links to the place of beginning.

The twelfth parcel is known as city lot No. 280 of the latest numbering of lots in said city and is bounded as follows: Beginning at a point on the east line of Presque Isle S. 2½ degrees N. 20 feet from the southwest corner of said lot 261, thence running along the east line of said street south 2½ degrees west 65½ links to said canal; thence along the north side of high water to said canal S. 83½ degrees E. 1 chain 50 links; thence N. 4 degrees E. 52⅙ links; thence north 79⅔ degrees W. 1 chain 52 links to the place of beginning.

The thirteenth parcel is all the land which was conveyed on the 5th of December, 1863, by Wm. Linsley *et ux.* to the firm of

93 Brown, Bonnell & Co. by a deed which is recorded in said records in volume 28, at page 233 *et seq.*, which deed is here referred to.

The fourteenth parcel is all the land ever owned or occupied by the Pennsylvania and Ohio Canal Company which lies between the center of Crabb creek, on the east, and the east side of what is known as Ranney's Mill, on the west, including between said east and west boundaries all of the land ever occupied by berme bank water channel and towing path of said canal.

The fifteenth parcel comprises all the lands conveyed to the firm of Brown, Bonnell & Co. by Henry Mannings on the 26th November, 1863, by a deed recorded in said records in volume 19, at page 711, except such part of said land as lies in the fourteenth parcel, and including all such rights as were conveyed by said Henry Manning in his said deed, which is here referred to.

The 15 parcels above named were conveyed on the 9th day of October, 1875, by Joseph H. Brown *et al.* to the party of the first part by a deed which is recorded in the records of said county in volume 38, at page 606 *et seq.*, and is here referred to.

The sixteenth parcel is the west half of the south half of lot No. 33 in Bane and Wicks' said subdivision, and also all of lot No. 32 in said subdivision, except such part of said lot No. 32 as was sold to Almon Ranney and wife and Bostwick Raney to Ellen Ferrell and except also such part of said lot 32 as was conveyed by said
94 Almon Raney and wife and Bostwick Raney to Ann McGraw by a deed which is recorded in the records of said county in volume 19, at page 493. Said 16th parcel was conveyed to said corporation 9th October, 1879, by H. O. Bonnell *et ux.* by a deed recorded in said records in volume 45, at page 352.

The seventeenth parcel is the north half of the west half of lot No. 33 of said Bane & Wicks' subdivision, excepting so much thereof as was conveyed away by George A. Young prior to 24th of March, 1880. The part above conveyed of said north half was conveyed to said corporation by A. W. Jones *et ux.* 24th April, 1880, by a deed recorded in said records in volume 47, at page 384, and this 17th parcel shall contain as a part thereof all the interest conveyed by said Jones in said deed to said corporation in any other part of said lot 33 of said subdivision.

The eighteenth parcel contains all that part of lot 275 of the late enumeration in said city which was conveyed to said corporation by Mary Degan *et al.* 24th November, 1880, by a deed which is recorded in said records in volume 48, at page 96, which deed is here referred to.

The nineteenth parcel is city lot No. 574 of the latest enumeration in said city, and was conveyed to said corporation 3rd January, 1881, by John Rigney *et ux.*, by deed recorded in the records of said county in volume 45, at page 583.

The twentieth parcel is lot No. 572 of the latest enumeration in said city and was conveyed 8th of February, 1881, to said corporation by Bryan Kennedy *et al.* by a deed recorded in said records in volume 49, at page 14.

95 The twenty-first parcel is lot No. 571 of the latest enumeration in said city, and was conveyed 22nd February, 1881, to said corporation by E. N. Wilson, administrator of Patrick Corrigan, by a deed recorded in the said records, in volume 48, at page 291.

The twenty-second parcel is the east half of lot No. 580 of the latest enumeration in the said city, and was conveyed to said corporation 19th March, 1881, by Christian Ludd *et al.* by a deed recorded in said records, volume 49, at page 93.

The twenty-third parcel is the northwest part of original lot No. 11, as shown by plat of village lots of Youngstown made by Dr. Henry Manning and recorded in Mahoning County Records of Plats, volume 1, page 51, bounded as follows: Commencing at the northwest corner of said lot No. 11, thence N. 74½ degrees E. 1 chain to lot owned by M. Fee, and now known as city lot 582, new numbers; thence S. 2 chains 7½ links; thence W. 98 links to east line of original lot No. 12; thence north ½ degree E. 2 chains 44½ links to the place of beginning, containing about ¼ of an acre of land, and was conveyed first of July, 1881, to said corporation by Thomas George *et ux.* by a deed recorded in said records, in volume 49, at page 393.

The twenty-fourth parcel is the west half of lot No. 580 of the latest enumeration of said city, and is the same land which was conveyed to said corporation 1st of July, 1881, by Catharine Scanlon *et al.* by a deed recorded in said records, in volume 49, at page 392.

The twenty-fifth parcel is part of a larger parcel of ground conveyed to John Stambaugh, trustee, by W. S. Parmelee, trus-
96 tee, 31st day of July, 1871, by a deed recorded in said records in Deed Book 31, at page 273 *et seq.*, and is bounded and described as follows: Beginning on the east line of said larger parcel at the middle of a stone monument standing at the northeast corner of a piece of ground conveyed by the Liberty and Vienna Railroad Co. to the Ashtabula, Youngstown and Pittsburgh Railroad Co. by a deed dated 25th August, 1871, and recorded in said records in volume 33, at page 463 *et seq.*, thence running along the east line of said larger parcel, conveyed as aforesaid by W. S. Parmalee, trustee, north 30 degrees 28 minutes E. about $398\frac{7}{10}$ feet to a stone monument at a point 15 feet southerly from the line of high-water mark on the south side of the Pennsylvania and Ohio canal; thence along a line parallel with and distant 15 feet southerly from the said line of high-water mark on the south side of said canal N. 49 degrees 44 minutes W. about $135\frac{3}{4}$ feet to a point which, measured along a line perpendicular to the east line of Market street, is distant easterly 150 feet from the east line of Market street; thence along a line parallel with and distant 150 feet easterly from the east line of Market street south 31 degrees 20 minutes W. about $421\frac{2}{10}$ to the north line of said ground, conveyed as aforesaid to the Ashtabula, Youngstown and Pittsburgh Railroad Co., and thence along the said north line of land conveyed to said railroad company south 59 degrees 2 minutes E. about $139\frac{7}{10}$ feet to the beginning, containing one acre and .28388 of an acre of land, and is the same land conveyed to said corporation by John Stambaugh, trustee, *et al.*, 14th July, 1881, by deed recorded in said records, in volume 50, at page 66 *et seq.*

97 The twenty-sixth parcel is the east end of out-lot No. 2 in said city, and contains about three & $\frac{2}{100}$ of an acre of land, and is the same land conveyed to said corporation 30th July, 1881, by Edwin Bell *et al.* by a deed recorded in the said records, in

volume 50, at page 63 *et seq.*, which deed is here referred — for a more particular description of said last-named parcel.

The twenty-seventh parcel is lot No. 576 of the latest enumeration in said city, and was conveyed to said corporation 16th Nov., 1881, by Mary Kelley by a deed recorded in said records, in volume 51, at page 34.

The twenty-eighth parcel is the east part of lot No. 575 of the latest enumeration in said city, and bounded as follows: Beginning at the northeast corner of lot No. 574 on the S. line of the Pennsylvania and Ohio canal; thence in a westerly course parallel with the south line of said lot No. 575 25 feet; thence south parallel with the west line of lot No. 574 to the north line of lot No. 573; thence east along the north line of said lot No. 573 25 feet to the S. W. corner of lot No. 574, and thence north along the west line of lot No. 574 to the place of beginning, and was conveyed to said corporation 25th November, 1881, by Mary Joice *et al.* by a deed recorded in said records, in volume 51, at page 63.

The twenty-ninth parcel is the west part of lot No. 575 of the latest enumeration in said city, situated on the south side of the Pennsylvania & Ohio canal, bounded on the north side by the towing path of the said canal, on the east by the east part of said lot No. 575, which said east part was conveyed by Charles Gil-
98 len to Mary Kelley, on the south by lots 573 and 577, and on the west by lot 576, and was conveyed to said corporation 2nd December, 1881, by Michael Conners *et ux.* by a deed recorded in said record, in volume 51, at page 90.

The thirtieth parcel—situated in the city of Youngstown, county of Mahoning and State of Ohio, and known as being a part of city lot No. 257, and is bounded as follows, to wit: Beginning at the northeast corner of Champion and Bane Sts., in said city, which is also the southwest corner of said lot No. 257, thence S. 60 degrees E. along the N. line of Bane street 75 feet to the east line of said lot No. 257; thence north 30 degrees E. along said line between said lots Nos. 256 and 257 100 feet; thence north 60 degrees W. parallel with said N. line of Bane street 75 feet to the east line of Champion street; thence south 30 degrees W. along said east line of Champion 100 feet to the place of beginning, and being a part of the same premises conveyed by Henry Wick, Mary T. Wick, Hugh B. Wick, and Lucretia T. Wick to John Keef by a deed dated the 8th day of April, 1869, and by said John Keef and Mary A. Keef, his wife, conveyed to Owen Evans by deed dated the 26th day of July, A. D. 1881, and by the deed dated the 26th day of July, A. D. 1881, and by the said Owen Evans and Ann Evans, his wife, conveyed to Chancey H. Andrews by deed dated the 30th day of November, A. D. 1881, and being a part of lot number twenty-six (26) of Bane and Wicks' subdivision of a part of the southern division of out-lots of the village of Youngstown, be the same more or less, but subject to all legal highways.

Thirty-first parcel: All of the two lots and parcels of land lying and being situate in township of Poland, county of Mahon-
99 ing and State of Ohio, the first of which said two parcels is

known as being a part of great lot number twenty-one (21) of the original survey of said township, and is bounded and described as follows, to wit: Beginning at a post in the line between lands formerly owned by W. N. McCombs and lands formerly owned by Thomas Struthers north of and twenty-five (25) feet from the centre of the Lawrence railroad, thence by said line north 380 degrees E. 12 and twenty-one hundredths (12.20) chains to a post, now stone, corner; thence south 89 degrees E. twenty-three and thirty-one hundredths (23.31) chains to the center of the Mahoning river; thence S. 42 degrees E. eight and eighty-one hundredths (8.80) chains; thence S. 39½ degrees W. eleven and twenty-one one-hundredths (11.21) chains; thence N. 30½ degrees W. eight and fifty-nine one-hundredths (8.59) chains; thence west nine and ninety one-hundredths (9.90) chains; thence south 39½ degrees W. six and forty-four one-hundredths (6.44) chains; thence 50½ degrees W. two and eleven one-hundredths (2.11) chains to the place of beginning, containing twenty-nine and forty-nine one-hundredths (29.49) acres of that land, more or less.

The second of said two parcels of land is known as being a part of great lot number eleven (11) of the original survey of said township, and is bounded and described as follows, to wit: Beginning at a post on the line between the above-described parcel of land and land formerly owned by W. N. McComb and thirty-three (33) feet north 39½ degrees E. from the center line of the Lawrence railroad, thence N. 32⅜ degrees E. five (5) chains and nine (9) links to a post; thence N. 84¾ degrees W. one chain and seventy-eight (78) links; thence N. 81⅞ degrees W. one (1) chain and fifty-four (54)
100 links; thence N. 77¼ degrees W. one chain and fifty (50) links; thence N. 72⅚ degrees W. one (1) chain and fifty (50) links; thence N. 67⅜ degrees W. one (1) chain and fifty links; thence N. 62⅝ degrees W. two (2) chains and thirty (30) links; thence along the north line of the Lawrence railroad, being thirty-three (33) feet from the center line of said railroad S. 50½ degrees E. twelve (12) chains and forty-six (46) links to the place of beginning, containing two and three one-hundredths (2.03) acres of land, more or less, and being the same land which was conveyed by W. N. McComb and wife to Thomas Struthers and others by deed dated April 15th, 1869, and recorded in Mahoning County Records, in vol. 26, at page 727 *et seq.*

The grantors also give and grant to said grantee, its successors and assigns, all the rights and privileges that they may have or own in the right of way upon which is constructed the switch railroad track connecting the above-described lands and running over a part of the same, with the Pittsburgh and Lake Erie Railroad Company's main line, reserving, however, the right at any time to and for them or any of them, or their heirs or assigns, to make connection with the said switch at any place where it runs on or over their own or other adjacent lands not hereby conveyed.

Thirty-second parcel: Situated in the city of Youngstown, county of Mahoning and State of Ohio, and known as part of what is now called out-lot No. 6, according to the latest numbering of lots in said

city. Said lot of land was formerly known as part of out-lot No. 10 in the east division of the original out-lots of said city, and
101 bounded as follows, to wit: Commencing at a point on the east side of Presque Isle street, distant southerly sixteen rods (16) from a point of said east side of said street fifteen (15) feet south from what was common water-mark in the Pennsylvania and Ohio canal, which point is now marked by an iron pin located and driven by James Mackey, surveyor; thence south with the east line of Presque Isle street sixty-seven feet ten and one-half inches (67 ft. 10½ in.) to a point four feet north of the N. rail of the Ashtabula, Youngstown and Pittsburgh railroad track; thence N. 78 degrees E. and one hundred and seventy-two and one-twelfth ($172\frac{1}{12}$) feet to a point, thence north, on a line parallel with the E. line of Presque Isle street, fourteen nine and one-half inches (14 ft. 9½ in.) to a point that is in the southeast corner of a certain lot of ground conveyed September 3rd, 1852, by Charles Grute to James H. Ford, by deed recorded in Mahoning County Record of Deeds, volume 7, page 183; thence westerly, on the southern boundary line of said lot conveyed by Grute to Ford, a distance of ten (10) rods to the place of beginning, with all appurtenances thereto belonging, together with all and singular the buildings, structures, boilers, engines, fixed and movable machinery, fixtures, tools, implements, locomotives, cars, railway track and appliances, office furniture and fixtures, patterns, duplicates, rolls, casting, lumber, and other personal property belonging or pertaining to the said real estate and used in connection therewith in carrying on the business of manufacturing now or formerly carried on upon the said premises and now upon the same connected therewith or pertaining thereto, and also a large amount of material and supplies and products in process of manufacture, which is being
102 changed in the operation of the said plant and is therefore not capable of exact inventory; also—

1. Eight hundred shares of stock in the Mahoning Coal Company, a corporation organized under the laws of the State of Ohio.

2. A two-thirds interest in the partnership known as Erskine & Co., doing business in the city of Youngstown, O.

3. Fire leases of coal lands in Butler county, Pennsylvania, standing in the name of Ralph Wick, trustee, and made by John M. and Sarah J. Chambers, Alex. Black, William Christy, James Kelly, and Walter Curry, and embracing together three ninety-two — acres of land.

4. The right to remove sand and gravel from a certain tract of land described as follows: A tract or lot of land situated in Coytsville township, in the county of Mahoning and State of Ohio, being part of great lot No. 8 in the original survey of said township and bounded as follows: On the north by the center line of the McGuffy road; on the east line by lands owned on the 8th day of May, 1863, by John Brownlee; on the south by said lands owned at the same date by said Brownlee, Aaron C. Seers, and Isaac Kimmel; on the west owned at the same date by David P. Pothous, being the farm upon which Alfred C. Steers formerly resided, containing thirty-eight and eight one-hundredths acres, being the same land con-

veyed to Catharine Huist by Brown, Bonnell & Co. January 20th, 1865, and recorded — Book 21, page 265 & '66, of Mahoning County Records of Deeds.

103 And the court further find that the amount herein found due to Wilcox and Scaife is the first lien on property herein described and is entitled to priority of payment in full; that the remaining creditors named herein are in equity entitled to payment of their claims herein stated with interest thereon *pro rata;* that said creditors are in equity entitled to a sale of said premises and property and the payment of their claims and interest out of the proceeds of such sale, and that said property will sell to better advantage as a whole than if sold in parcels.

The court do therefore order, adjudge, and decree that the said defendant, Brown, Bonnell & Company, within five days from the entering of this decree, pay or cause to be paid to the creditors specified herein or to the clerk of this court for their use the amounts herein found to be due to said creditors, together with the costs of this action, to be taxed, and in default of such payment an order of sale issue to Wilbur F. Goodspeed, who is hereby appointed special master commissioner for that purpose, commanding him to cause the real and personal property herein described, except materials and supplies and products manufactured or in process of manufacture, to be appraised, advertised, and sold as upon a judgment at law, and to sell the same in one parcel without division, and to make report to this court of such sale for confirmation; and it is further ordered that of the purchase price so bid not less than the sum of twenty thousand ($20,000) dollars shall be paid in cash to be deposited in the registry of this court, and also such further portions of such purchase price shall be paid in cash and so deposited from time to time as this court in this case may direct, the court reserving the

104 right to resell in this case said premises and property at the expense of such purchaser and to charge such purchaser with any loss occasioned by such resale, upon failure of the purchaser thereof or their successors or assigns to comply within twenty days of an order of the court in that regard, and the balance of such purchase price not required to be paid in cash may be paid either in cash or the purchaser at such sale shall have the right to satisfy the said remainder of his bid in whole or in part by paying over and surrendering claims, proved in this cause and stated herein, at such price or value as would be equivalent to the distributive amount that the holders thereof would be entitled to receive thereon in case the entire amount of the bid were paid in cash; and it is further ordered that the receiver herein be, and is hereby, empowered and ordered to sell at private sale all the materials and supplies and product manufactured or in process of manufacture in his hands for such reasonable price as at such time as in his discretion he shall deem best.

The court, for good cause shown, dispenses with any advertisement of such sale or sales in any newspaper published in the German language.

And it is further ordered that the sale of said property be made subject to the fulfillment of any pending or unfinished contract or contracts made by the said receiver in the carrying on of said business by the authority of this court, and that the purchaser of such sale, at such time as the court may direct, give bond to the said receiver in the penal sum of twenty thousand —, with surety to be approved by the clerk of this court, to protect and save harm-
105 less the said receiver from any and all liability on any such pending or unfinished contract or contracts.

And it is further ordered that as to all other property, moneys, and credits of said defendant now in the hands of said receiver or which may hereafter come into his hands, he, the said receiver, hold the same subject to the further order of this court.

It appearing to the court that the Pittsburgh and Lake Erie railroad and the Citizens' National Bank of Pittsburgh, creditors of the defendant who have proved their claims in this cause, did, after the appointment of the receiver, by procuring process of attachment to be issued out of certain courts in the State of Pennsylvania against the property and credits of the said defendant found in said State of Pennsylvania, obtained for themselves advantages over the other creditors of said defendant in the following amounts:

The Pittsburgh & Lake Erie railroad	$5,768 01
The Citizens' National Bank of Pittsburgh	3,745 41

It is therefore ordered and decreed that the said The Pittsburgh and Lake Erie railroad — the Citizens' National Bank of Pittsburgh shall not be entitled to receive out of the proceeds arising from any sale made herein any portion thereof in dividends or *pro rata* shares until dividends — *pro rata* shares are paid or credited to creditors herein named, other than said attaching creditors, sufficient in amount to equalize said advantages and sufficient to make the amounts so received by or credited to said other creditors bear the same proportion to the full amount of their claims that the
106 amounts obtained by said attachments bear to the full amounts of the several claims of said attaching creditors.

And it further appearing to the court that the firm of Webb, Hart & Co., one of the creditors who have proved their claims herein, has become indebted to the receiver herein for goods sold and delivered, and that judgment has been obtained against said firm by the receiver on account of said indebtedness in the amount of one thousand fifty-four dollars forty-five cents damages and thirty dollars sixty-five cents costs, upon which judgment execution has been issued and returned *nulle bona*, and that said judgment is still unsatisfied and unreversed, it is therefore ordered and decreed that out of any amount payable on account of said claim of Webb, Hart & Co. there shall first be paid to said receiver an amount sufficient to satisfy said judgment and costs before any part of said amount shall be paid to said Webb, Hart & Co., and that as to all matters and things not herein disposed of this cause be continued.

(Signed) JOHN BAXTER, *Judge*, and
M. WELKER,
District Judge.

107 [Endorsed:] No. 4195. United States circuit court, northern district of Ohio. Lake Superior Iron Co. *et al. vs.* Brown, Bonnell and Company. Decree. Filed Feb. 23, 1886. A. J. Ricks, clerk U. S. circuit court.

108 UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division:

I, Augustus J. Ricks, clerk of the circuit court of the United States for the northern district of Ohio, do hereby certify that the above and foregoing pages contain a full, true, and perfect copy of the bill, supplemental bill, order appointing receiver, order *pro confesso*, original inventory and schedule of property and assets, pleas of defendant corporation, motion to discharge receiver, order of court on plea and motion, order of court showing payment of Negaunee Concentrating Co. claim, intervention of Commercial National Bank and others, response of creditors to cross-bill of Commercial National Bank and others, order of court on exceptions in mortgage matter, order of reference to master to report on claims, report and supplemental report of master on creditors' claims, balance-sheet of receiver, Dec. 31st, 1885, and the final decree of sale in the case now pending in the said court in which The Lake Superior Iron Company and others are complainants and Brown, Bonnell and Company is defendant, and that the same have been compared with the original papers now on file in said case and in my custody and control as clerk of said court.

Witness my official signature and the seal of said court, at Cleveland, O., this 5th day of March, A. D. 1886, and in the 110th year of the Independence of the United States of America.

Seal of the Circuit Court, North'n Dist. of Ohio.

AUGUSTUS J. RICKS, *Clerk*,
By O. C. BEATTY, *Deputy Clerk*.

109 In the Supreme Court of the United States.

THE LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL & CO.

Know all men by these presents that Brown, Bonnell & Co., a corporation of the State of Ohio, and William B. Howard, of Chicago, Illinois, are held and firmly bound unto the Lake Superior Iron Company, the Jackson Iron Company, and the Importers' and Traders' National Bank of the City of New York in the sum of fifty thousand dollars, lawful money of the United States, to be paid to the said obligees and their successors and assigns for the benefit of whom it may concern.

To the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, executors, and administrators, firmly by these presents.

Sealed this March 23, 1886.

Whereas the above-named Lake Superior Iron Company, the Jackson Iron Company, and the Importers' and Traders' National Bank of the City of New York, in behalf of themselves and other creditors, have procured a final decree and order for the sale of property in a certain action in equity pending in the circuit court of the United States for the northern district of Ohio, sitting at Cleveland, wherein they are complainants and the said Brown, Bonnell & Co. is defendant; and

Whereas, from such final decree entered February, 1886, the
110 said Brown, Bonnell & Co. has prayed an appeal to the Supreme Court of the United States, which has been allowed:

Now, therefore, the condition of this obligation is such that if the above-bounden Brown, Bonnell & Co. shall prosecute its appeal to effect and answer all costs and damages if it shall fail to make its appeal effectual, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) BROWN, BONNELL & CO., [SEAL.]
By HENRY CRAWFORD,
Its Att'y-in-Fact.
WILLIAM B. HOWARD. [SEAL.]

Approved March 29, 1886.
M. R. WAITE,
Chief Justice U. S.

STATE OF NEW YORK,
City & County of New York:

William B. Howard, on oath, says that he resides at Chicago, Illinois, and is the surety named in the above appeal bond to which he has subscribed his name. Affiant says he is worth over one million dollars above all his debts and liabilities, and that he owns real estate in Cook county, Illinois, worth $500,000.

(Signed) WILLIAM B. HOWARD.

Subscribed and sworn to before me this 24 day of March, 1886.
[SEAL.] G. M. ROLLINS,
Notary Public, N. Y. Co., 137.

111 [Endorsed:] Circuit court of U. S., northern district of Ohio. Lake Superior Iron Co. & others *vs.* Brown, Bonnell & Co. Appeal bond. Filed April 6, 1886.

112 Supreme Court of the United States.

BROWN, BONNELL & Co.
vs.
LAKE SUPERIOR IRON COMPANY, JACKSON IRON COMPANY, IMPORTERS' & TRADERS' NATIONAL BANK, Appellees.

To the above-named Lake Superior Iron Co., Jackson Iron Co., & Importers' & Traders' Nat. Bank:

You are hereby admonished and cited to appear before the Supreme Court of the United States, at a term thereof to be holden at

Washington on the second Monday of October, 1886, to show cause, if any there be, why a certain final decree rendered in the above-entitled cause by the circuit court of the United States for the northern district of Ohio should not be corrected and justice done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this March 29, 1886.

M. R. WAITE,
Chief Justice U. S.

Service of the above citation acknowledged and accepted.
FRANCIS J. WING.
C. C. BALDWIN.

113 [Endorsed:] Lake Superior Iron Co. & others *vs.* Brown, Bonnell & Co. Citation & service.

114 THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify the foregoing to be a true copy of the appeal bond & citation in the above-entitled cause in said court, and that the same is correctly copied from the original now on file in my office.

Seal of the Circuit Court, North'n Dist. of Ohio.

Witness my official signature and the seal of said court, at Cleveland, in said district, this sixth day of October, A. D. 1886, and in the 111th year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk*,
By O. C. BEATTY, *Deputy Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 227. Brown, Bonnell & Co., appellants, *vs.* The Lake Superior Iron Company, The Jackson Iron Company, and The Importers' and Traders' National Bank of the City of New York. Filed October 20, 1886.

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 227.

BROWN, BONNELL & COMPANY, APPELLANTS,

vs.

THE LAKE SUPERIOR IRON COMPANY, THE JACKSON IRON COMPANY, AND THE IMPORTERS' AND TRADERS' NATIONAL BANK OF THE CITY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 3, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 227.

BROWN, BONNELL & COMPANY, APPELLANTS,

vs.

THE LAKE SUPERIOR IRON COMPANY, THE JACKSON IRON COMPANY, AND THE IMPORTERS' AND TRADERS' NATIONAL BANK OF THE CITY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 22, 1889.

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a In the Supreme Court of the United States.

BROWN, BONNELL & COMPANY
vs.
THE LAKE SUPERIOR IRON COMPANY *et al.* } No. 819. In Equity.

It is hereby stipulated by the parties to the above-entitled cause through their respective counsel, that the papers, documents, and transactions mentioned in the annexed motion shall be added by the appellants to the transcript of the record of the said cause now on file in the United States Supreme Court; and it is further stipulated that the petitions of all creditors, copies of whose petitions are not found in the transcript, are of the general character of the petition of the Greenville National Bank, of Greenville, Pa.

FRANCIS J. WING.
Counsel for Appellee-.
HENRY CRAWFORD,
Counsel for Appellant-.

b In the Supreme Court of the United States.

BROWN, BONNELL & COMPANY, Appellants,
vs.
THE LAKE SUPERIOR IRON COMPANY *et als.* } No. 819. In Equity.

Come now the said appellees, The Lake Superior Iron Company and others, by Shellebarger & Wilson, their solicitors, and move the court to dismiss the appeal in this case, and for ground of such motion say that the pretended record and transcript filed herein are not certified by the clerk of the United States circuit court for the northern district of Ohio, as required by law, and are not authenticated in the manner required by law in order to give this court jurisdiction of the appeal.

Second. And the said appellees, by their said solicitors, and in the alternative and in the event the court should deny said motion to dismiss, suggest diminution of the record in this case, in this, to wit, that in the record of the circuit court of the United States for the northern district of Ohio the following, amongst many others, papers, documents, and transactions are part of the record in said case in said circuit court, and are not embraced in said record filed herein, and are essential to the full consideration and determination of the matters involved in said cause, namely:

1. The original subpœna issued by the said circuit court,
c dated February 20, 1883, for the said defendant corporation, Brown, Bonnell & Co., and the return made thereon by W. F. Goodspeed, the United States marshal, by John Odell, his deputy; and the memorandum thereto attached, signed by A. J. Ricks, clerk of said court, requiring defendant to enter its appearance in said case before the first Monday in April, 1883; otherwise bill taken as confessed.

2. The entry of the voluntary appearance of the defendants, Brown, Bonnell & Co., entered in court on the 20th of February, 1883, by Joel W. Tyler, attorney for defendants.

3. The bond of the receiver, approved February 20, 1883.

4. The affidavit of the insolvency of the defendant by Henry H. Brown, February 20, 1883.

5. Order by the court, entered February 26, 1883, empowering and directing the receiver to institute suits.

6. Order of court of February 28, 1883, directing the marshal to turn over certain attached property to the receiver.

7. Subpœna, issued April 5, 1883, for parties made defendant in supplemental bill, and the returns thereon by deputy marshal, and the memorandum by the clerk, requiring defendants to appear before first Monday of May, 1884; otherwise bill taken *pro confesso*.

8. Court's order of 10th of April, 1883, to the receiver to lease certain premises described in the order.

9. Appearance, April 13, 1883, of A. W. Jones, F. H. Matthews, R. J. Wick, and John J. Williams.

10. Order of the court of 23d of April, 1883, directing all creditors of defendant corporation, within sixty days from date of order, to file their claims by petition, etc.

11. Petition of the Rossie Iron Works of New York, filed May 17, 1883.

d 12. Petition of the Florence Mining Company of Wisconsin, filed May 29, 1883.

13. Petition of the Manufacturers' & Traders' Bank of Buffalo, filed June 6, 1883.

14. Order *pro confesso*, entered June 14, 1883, against defendants.

15. Order, entered July 17, 1883, appointing A. J. Ricks special master to report claims due, and marshal liens.

16. Order of the court, July 20th, 1883, that receiver transfer to Pittsburgh & Lake Erie Railroad Co. certain indebtedness by Graff, Bennett & Co. to defendant corporation.

17. Report of master on the claim of the Florence Mining Company, filed Nov. 1, 1883.

18. Exceptions, filed Nov. 21, 1883, to the report in the claim of the Florence Mining Company.

19. The summons for Herbert C. Ayer, commanding him to appear and answer original and supplemental bill, dated November 23, 1883, and the memorandum by the clerk requiring him to appear and answer before the first Monday in January, 1884; otherwise decree *pro confesso*.

20. The answer and cross-petition of the Citizens' National Bank of Pittsburgh, filed November 24, 1883.

21. Motion by Citizens' National Bank of Pittsburgh, on 24th of November, 1883, for leave to become party, etc.

22. The demurrer by R. J. Wick, defendant, to the complainants' bill, filed November 24, 1883.

23. The petition of the Importers' and Traders' National Bank of New York, filed by leave of court November 24, 1883.

e 24. Suggestions by John Hay and others, November 24, 1883, of the death of Amasa Stone, and leave to the executors to become parties and answer.

25. Leave to the Rossie Iron Works to become parties and file petition, November 24, 1883.

26. Bill of the Rossie Iron Works of New York, filed November 26, 1883.

27. Order of court, November 26, 1883, making Citizens' National Bank of Pittsburgh parties, and their bill filed in pursuance —, and similar order, same day, as to Importers' and Traders' Bank.

28. Motion by the complainants, November 26, 1883, to strike from files demurrer of Wick, and also to strike from files motion by Matthews and others.

29. Motion by complainants, November 26, 1883, to strike from files the pleas filed by the defendant corporation November 24, 1883.

30. Cross-bill of the Commercial National Bank of Cleveland, John Hay and Samuel Mather, executors of the estate of Amasa Stone and others, filed December 1, 1883.

31. Order of the court of the 24th day of December, 1883, striking from files demurrer filed by R. J. Wick; also the motion filed by Matthews and others.

32. Leave by the court of the 24th day of December, 1883, to the Commercial National Bank, Dan. P. Eells, and others to file answers to the original and supplemental bills.

33. Reply, January 23, 1884, by complainants to the answer of the Commercial National Bank and others.

34. Motion by defendant corporation, Brown, Bonnell & Co., February 28, 1884, to strike from the files answer of the Commercial National Bank and others.

f 35. Order of the court of February 20, 1884, that the answer of the Commercial National Bank and others be considered and treated as an intervening petition, praying affirmative relief, and leave given to creditors to file response thereto.

36. Answer of the Ravenna National Bank to the intervening petition of Commercial National Bank and others, filed March 1, 1884.

37. Response by the Manufacturers' and Traders' National Bank of Buffalo, filed March 1, 1884, to the intervening petition filed by the Commercial National Bank and others in behalf of themselves and other creditors.

38. Final report of master on the intervening petition of the Commercial National Bank and others, filed May 2, 1884.

39. Testimony taken before the master, filed with his report and as part thereof at the same time.

40. Report of master upon claim of creditors, filed June 11, 1884.

41. Order of court, June 18, 1884, commanding defendant corporation to answer by the 1st of September.

42. Exceptions by F. J. Wing to certain findings of special master, filed the 19th day of June, 1884.

43. Order of the 26th day of July, 1884, overruling the exception by Wing — master's report.

44. Order of the court, October 11, 1884, approving of the report of master upon claims of creditors.

45. Subpœna, issued June 28, 1884, against the defendant, Brown, Bonnell & Co., requiring it to answer the answer and error bill of the Commercial National Bank and others, with a memorandum thereon requiring the said respondent to enter its appearance on or before the first Monday of August, 1884; otherwise said
g bill would be taken as confessed, and return thereon by marshal.

46. Order *pro confesso*, entered September 11, 1884, against the defendant, Brown, Bonnell & Co., that the answer and cross-bill or intervening petition of the Commercial National Bank and others be taken as confessed.

47. Motion made May 4, 1884, by Manufacturers' & Traders' National Bank of Buffalo, First National Bank of Youngstown, and other creditors that their names be stricken from the answer to the intervening petition of Commercial National Bank and others, and their waiver of answer and consent to decree in favor of said Commercial National Bank and others.

48. Order of court, May 9, 1885, granting leave to Manufacturers' & Traders' Bank and others to withdraw answer.

49. Exceptions by said intervening petitioners, Commercial National Bank and others, to special master's report, filed May 2, 1885.

50. Exceptions, June 1, 1885, by C. S. Warden and others to master's report.

51. Exceptions, June 2, 1885, by Henry Crawford, for defendant corporation, to master's report.

52. Motion, filed July 13, 1885, by Commercial National Bank and others to strike from files exceptions to master's report.

53. Joinder, July 22, 1885, by defendant corporation and others in exceptions filed to master's report.

54. Motion by Commercial National Bank and others, intervenors, to strike from files the response of C. S. Warden and others to intervening petition.

55. September 15, 1885.—Motion by Commercial National
h Bank and others, intervenors, to strike out joinder in exceptions filed by defendant corporation and others July 22, 1885.

56. September 24, 1885.—The decree of the court finding that Commercial National Bank of Cleveland and others, complainants in intervening petition, did not acquire any lien or priority under their mortgage or deed of trust over other creditors, and overrules master's report as to this and sustains exceptions thereto, and directs said intervening petition, so far as it seeks to maintain a lien and priority over other creditors, to be dismissed, but such petition to be retained for such further relief and protection as intervenors may be entitled to.

57. Order of court, 26th of September, 1885, directing the master to take an account of assets and report.

58. November 20, 1885.—Report by the master pursuant to last-named order.

59. Supplemental report of master, filed January 13, 1885.

60. The entries upon the appearance docket showing when the various petitions of creditors were filed.

61. The petition of the Greenville National Bank of Greenville, Pa.

Wherefore the said appellees, in the alternative as above stated, move the court, under rule 14, to award a writ of certiorari to be issued and directed to the judges of the said circuit court of the northern district of Ohio, commanding them *with* searching the record and proceedings in the said cause, they forthwith certify to this court those parts of the said record so omitted.

And the said appellees, by their solicitors, as tending to explain and excuse the delay in filing this motion, state as follows:

First. That until about the last of September, 1887, the appellees had no counsel in the case who resided in the city of Washington, and no counsel for the appelless were aware of the character of the
i certificate to said record, nor the omissions from the record filed in this court until about the midsummer of 1887.

Second. That prior to the 12th day of October, 1887, counsel for appellees were not aware of the requirements contained in the 14th rule regarding the time when motions for certiorari on suggestion of dimunition of the record were ordered to be filed.

Third. That the record in this case is not yet printed, and the case cannot probably be reached at the present term of court, and the granting of the order for certiorari will work no delay in the hearing or trial of the case.

Fourth. That in the opinion of counsel for appellees a full consideration and trial of the case upon the merits in the absence of the omitted portions of the record is impossible.

SHELLABARGER & WILSON,
Solicitors for Appellees.

k [Endorsed:] Supreme Court U. S. 1888, Oct'r term. No. 227. Brown, Bonnell & Co., app'ts, *vs.* The Lake Superior Iron Co. *et al.* Stipulation to amend record.

[Endorsed:] U. S. Supreme Court. Brown, Bonnell and Company *vs.* The Lake Superior Iron Co. *et al.* Stipulation.

[Stamped:] Office Supreme Court U. S. Filed May 25, 1888. James H. McKenney, clerk.

1 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON COMPANY *et* — *vs.* BROWN, BONNELL AND COMPANY. } Chancery. 4195.

Be it remembered that heretofore, to wit, on the 20th day of February, A. D. 1883, a subpœna was issued in this cause, and which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Brown, Bonell & Company, if it is to be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in May next, to answer a certain bill in chancery filed and exhibited in said court against it by the Lake Superior Iron Company, Jackson Iron Company, and Negaunee Concentration Co. Hereof it is not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

2 Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of February, A. D. 1883, and in the 107th year of the Independence of the United States of America.

[SEAL.]

AUGUSTUS J. RICKS, *Clerk.*

MEMORANDUM.—The said defendant is required to enter its appearance in this suit, in the clerk's office of said court, on or before the first Monday of April, 1883; otherwise the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk.*

Endorsed: No. 4195. United States circuit court, northern district of Ohio, eastern division. In chancery. The Lake Superior Iron Co. *vs.* Brown, Bonnell & Co. Subpœna. Returnable April 2nd, 1883. Rule day for appearance, April 2nd, 1883. Rule day for answer, May 7th, 1883. Returned and filed February 23, 1883. A. J. Ricks, clerk. M. R. Keith and F. J. Wing, complainants' solicitors.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 21st day of Feb., 1883, at Youngstown, Ohio, I made due service of this writ on the within-named Brown, Bonell & Co. by delivering to F. H. Mathews, vice-president of said company (the

president being absent and could not be found), a true and duly certified copy of this writ.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODEL, *Deputy.*

Fees:

Service	$2 00
Actual ex.	6 50
Copy	50
	$9 00

3 And afterwards, to wit, on the 20th day of Feb., 1883, the following appearance of defendant entered was filed in the cause, and which is in words and figures following, to wit:

In the United States Circuit Court, Northern District of Ohio.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & CO. } Equity No. 4195.

The appearance of the defendant is hereby entered in the above case and service of notice of the motion for appointment of receiver accepted.

February 20th, 1883.

JOEL W. TYLER,
Att'y for D'f't.

4 And afterwards, to wit, on the 20th day — Feb., the following receiver's bond was filed in this cause, and which is in words and figures following, to wit:

Know all men by these presents that we, Fayette Brown, as principal, and Amasa Stone, Selah Chamberlain, and Charles A. Otis, as sureties, all of the northern district of Ohio, are held and firmly bound unto the Lake Superior Iron Company, Jackson Iron Company, and Negaunee Concentration Company in the sum of one hundred thousand dollars, to be paid to said Lake Superior Iron Company, the Jackson Iron Company, and the Negaunee Concentration Company; for which payment, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our representatives, heirs, and executors and administrators, firmly by these presents.

Signed, sealed, and dated this 20th day of February, A. D. 1883.

The condition of the above obligation is such that whereas by an order of the circuit court of the United States in and for the eastern division of the northern district of Ohio made on this 20th day of Feb., A. D. 1883, in a cause therein pending wherein The Lake Superior Iron Company and others above named were complainants and Brown, Bonnell & Company is defendant, it was, among other

things, ordered that the above-bounden Fayette Brown be appointed receiver of all the property, equitable interests, things in action, and effects of said defendant, and that he be vested with all the rights and powers of a receiver as in and by said order set forth and upon the conditions in said order stated:

Now, therefore, if the said Fayette Brown shall faithfully discharge all his duties as such receiver in this action and account faithfully for and pay over to the proper parties all moneys that may
5 come into his hands and in all respects obey all the orders of this court now made and that may hereafter be made in this action, then the above obligation to be void; otherwise to be in full force and effect.

[SEAL.]	FAYETTE BROWN.
[SEAL.]	CHAS. A. OTIS.
[SEAL.]	A. STONE.
[SEAL.]	S. CHAMBERLAIN.

Endorsed: Filed and approved Feb. 20th, 1883. A. J. Ricks, clerk.

6 And afterwards, to wit, on the 20th day of February, 1883, the following affidavit of Harry H. Brown was filed in this cause, and which is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY.

Harry H. Brown, being duly sworn, on his oath says that he is the duly authorized agent of the complainants in this action; that he is acquainted with the business and general condition of the defendant company; that said defendant is insolvent; that its property and business is very extensive; that such business is threatened with attachments and seizures of its property and vexatious litigation; that a large amount of the property of said defendant is of such a nature that if sold in its present condition it would be sacrificed and there would be realized a very small amount as compared with the amount that could be realized if the same were manufactured in the works of said defendant; that the assets and the property of said company is in danger of loss and dissipation if left unprotected by the appointment of a receiver, who may preserve it and put it into such a condition that the most may be realized from it for the benefit of creditors. The works are in danger of being stopped by reason of the insolvency of the defendant, and the
7 resultant damage to the same would be very great, and consequently greatly injure the prospects of creditors and the collection of the claims.

HARRY H. BROWN.

Sworn to before me and subscribed in my presence this 20th day of February, A. D. 1883.

[SEAL.] FRANCIS J. WING,
Notary Public.

8 And afterwards, to wit, on Monday, February 26th, 1883, the following order was made in this cause, and which is in words and figures following, to wit:

LAKE SUPERIOR IRON CO.
vs. } 4195, Chancery.
BROWN, BONNELL & CO.

It appearing to the court that there are assets of the said defendant, Brown, Bonnell and Company, in the hands of residents and citizens of other districts than the said northern district of Ohio, and that it may be necessary to institute actions at law or in equity to obtain possession and control of such assets, it is hereby ordered and decreed that said receiver be, and he is hereby, empowered and directed to institute such suit or suits at law or in equity, in this or other jurisdictions, as in his judgment it is deemed necessary or expedient, to collect debts or demands payable to him as such receiver or to obtain possession of any assets of said Brown, Bonnel & Company which may be withheld from him.

9 And afterwards, to wit, on Wednesday, Feb. 28th, 1883, the following order was made in this cause, and which is in words and figures following, to wit:

LAKE SUPERIOR IRON CO.
vs. } 4195, Chancery.
BROWN, BONNELL & CO.

The parties in the case of The Republic Iron Co. *vs.* Brown, Bonnel & Co., pending in this court, having agreed that the marshal of this court may turn over to the receiver appointed in this action the property attached in said action and now in the hands of said marshal, it is ordered that said receiver take said property and dispose of it as he does other property in his hands as such receiver; and if the plaintiff maintains its attachment and the same is not discharged and judgment is rendered for its claim or any part thereof, then the receiver is to pay such judgment, interest and costs, in full; if said attachment is discharged, then the receiver not to pay any judgment that may be rendered and hold the property as other property of def't, and the receiver is ordered to retain in his hands enough assets to pay said judgment, interest and costs, in case said attachment is not discharged.

10 And afterwards, to wit, on the 5th day of April, 1883, the following subpœna was issued in this cause, and which is in words and figures following, to wit:

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon A. W. Jones, Charles A. Otis, F. H. Mathews, Amasa Stone, W. H. Harris, Dan. P. Eells, Mrs. Eliza Witt, Howard P. Eells, John I. Williams, Geo. M. Ayer, Mrs. Amy G. Ayer, H. I. Higgins, Maria Louisa Ayer, Mr. H. C. Ayer, A. M. Witheril, D. P. Eels, trustee; Mrs. Paige E. Newburry, Mrs. L. A. Copeland, Harriet L. Ayer, J. C. Knickerbocker, R. J. Wick, Levi Lane, H. C. Ayer, and F. B. Williams, if they are to be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in May next, to answer a certain bill in chancery filed and exhibited in said court against them by the Lake Superior Iron Company.

Hereof they are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of April, A. D. 1883, and in the 108th year of the Independence of the United States of America.

[SEAL.]

11

A. J. RICKS, *Clerk.*
By O. C. BEATTY,
Deputy Clerk.

MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of May, 1884; otherwise the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk.*

Endorsed: No. 4195. United States circuit court, northern district of Ohio, eastern division. In chancery. The Lake Superior Iron Co. *vs.* Brown, Bonnell & Co. *Alias* subpœna. Returnable May 7th, 1883. Rule day for appearance, May 7th, 1883. Rule day for answer, June 4th, 1884. Returned and filed, April 10th, 1883. A. J. Ricks, clerk. M. R. Keith & F. J. Wing, complainants' solicitors.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 6th day of April, 1883, at Cleveland, Ohio, I made due service of this writ as follows, to wit: By delivering a true and duly certified copy thereof to each of the within-named Amasa Stone, D. P. Eells, D. P. Eells, trustee; Eliza Witt, and Howard P. Eells, and by leaving a true and duly certified copy of this writ at the usual place of abode of the within-named Charles A. Otis in the hands of Mary Welch, a servant in the family, and by leaving a true and duly certified copy of his writ at the usual place of abode of the within-

named W. H. Harris, in the hands of Mary Schaffer, a servant in the family, the said Charles A. Otis and W. H. Harris being each absent from home and could not be found; and on the 7th day of April, 1883, at Youngstown, Ohio, I made due service of this
12 writ as follows, to wit: By delivering a true and duly certified copy thereof to each of the within-named A. W. Jones, John I. Williams, and R. J. Wick, and by leaving a true and duly certified copy of this writ at the usual place of abode of the within-named F. B. Williams in the hands of his wife, Anna Williams, and by leaving a true and duly certified copy of this writ at the usual place of abode of the within-named F. H. Mathews in the hands of Anna Neil, a servant in the family, the said F. B. Williams and F. H. Mathews being each absent from home and could not be found. The said A. M. Witherill, J. C. Knickerbocker, Mrs. L. A. Copeland, Levi Lane, George M. Ayer, Mrs. Amy G. Ayer, H. I. Higgins, Maria Louisa Ayer, Mrs. H. C. Ayer, Harriet L. Ayer, and H. C. Ayer not found in *any* district; neither have they or either of them a residence therein.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

Service	24 00
Copies	8 00
Travel, 80 miles	4 80
	$36 80

NORTHERN DISTRICT OF OHIO, *ss:*

On the 9th day of April, 1883, at Cleveland, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to A. St. J. Newburry, husband of the within-named Mrs. Paige E. Newburry, at her usual place of abode.

W. F. GOODSPEED,
U. S. Marshal,
By GEO. WYMAN, *Deputy.*

Service	2 00
Copy	50
	$2 50

13 And afterwards, to wit, on Tuesday, April 10th, the following was made in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNEL & Co. } 4195, Chancery.

Upon application duly made, and it appearing to the court that it will be advantageous to all concerned in the administration of

the assets of the said defendant, it is hereby ordered and decreed that Fayette Brown, as receiver, be, and he is hereby, empowered to lease to the Briar Hill Iron and Coal Company or other responsible person the property of Brown, Bonnell & Company known as the Struthers Furnace at a rental which shall be deemed by said receiver to be proper and adequate, provided that such lease shall not be given for a term to exceed two months and shall at any time be determinable by the sale of said property for the benefit of creditors or by the fact that said Fayette Brown has ceased to act as receiver.

14 And afterwards, to wit, on the 12th day of Apr., 1883, the following appearance was entered in order book in this cause, and which is in words and figures following, to wit:

YOUNGSTOWN, MAHONING COUNTY, O., *Apr.* 12, '83.

A. J. Ricks, Esq.

DEAR SIR: In Lake Superior Iron Co. *vs.* Brown, Bonnell & Co., No. 4195, chancery, on May 7th, please enter appearance for A. W. Jones, F. H. Mathews, R. J. Wick, and John I. Williams.

I write now for the reason that I leave to-morrow for Arizona, and may not return by May 7th.

Very truly,

A. W. JONES,
Att'y for Parties.

15 And afterwards, to wit, on Monday, April 23d, 1883, the following order was made in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } 4195, Chancery.

The court, being fully advised in the premises, orders and decrees that all creditors of said def't, Brown, Bonnell & Co., shall on or before sixty days from the entry of this order file their several claims in the clerk's office of this court by petition, in which shall be stated the amount and nature of such claims, and such petitions shall be duly verified by the oaths of the petitioners or their duly authorized agents; and it is further ordered that notice of the granting of this order be given to all creditors by publication, and the receiver is hereby directed to send a copy of this order by due course of mail to each and every known creditor.

16 And afterwards, on May 17, 1883, the following petition was filed, viz:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL & Co.
} Equity No. 4195.

To the honorable judges of said court:

Your petitioner, The Rossie Iron Works, a mining and manufacturing corporation formed under statutes of State of New York, who do business in St. Lawrence & Jefferson counties, in said State of New York, respectfully show that this petition is filed in the above-entitled cause in pursuance of an order of said court hereinbefore made; that the Rossie Iron Works are creditors of the said defendant, Brown, Bonnell & Co., of Youngstown, Ohio, in the sum of eight thousand four hundred and thirty-three $\frac{43}{100}$ (exclusive of interest) dollars ($8,433.43 exclusive of interest); that the said claim is just and unpaid and is described as follows, to wit: On a promissory note dated Youngstown, Ohio, December 27th, 1882, for six thousand two hundred and fifty-three dollars ninety-three cents, made by Brown, Bonnell & Co., payable to the order of the Rossie Iron Works, sixty days after the date, at the Second National Bank of Youngstown, Ohio, and which said note was duly protested for non-payment on the 27th day of February, 1883, and still remains unpaid. The said notes are given in settlement of accounts for iron ore delivered by the Rossie Iron Works to Brown, Bonnell & Co., with interest; notarial charges for said protest were $1.40, interest to be reckoned on said note and protest charges from 28th Febr'y, 1883, viz:

Interest on	$1,370.46	to be reckoned	from	Jan. 15,	1883.
"	780.32	" "	"	Feb. 15,	"
"	27.32	" "	"	Mar. 15,	"
	2,178.10				

$726\frac{85}{240}$ at $3 per ton at the mines.

That copy of said note and account is hereto attached and made a part of this petition.

Your petitioners further show that they hold no security for said claim.

Wherefore your petitioners pray that the said claim may be adjudged to be a valid claim against the property and assets of said Brown, Bonnell & Co., and that out of the proceeds arising from the sale of such property and assets said claim may be paid under such orders and decrees as the court shall deem equitable and just, and or all such other and further relief as your petitioner may in equity, be entitled to.

ROSSIE IRON WORKS
By B. F. BUTLER, *Treasurer.*

STATE OF NEW YORK, } ss:
City and County, }

B. F. Butler, being duly sworn, says that he has read the foregoing petition and knows contents thereof, and that the allegations of the foregoing petition are true.

B. F. BUTLER.

Sworn to before me and subscribed in my presence this 16th day of May, A. D. 1883.

[SEAL.] FRANK D. RUSSELL,
Notary Public for Kings & New York Counties, in N. Y. State.

17 Copy.

$6,253.93. YOUNGSTOWN, *Dec. 27th*, 1882.

Sixty days after date we promise to pay to the order of Rossie Iron Works sixty-two hundred fifty-three and $\frac{93}{100}$ dollars, at Second National Bank here, in N. Y. Exchange, value received.
No. 627.

(S'g'd) BROWN, BONNELL, & CO.,
By F. H. MATTHEWS, *Trea.*

Copy.

Rossie Iron Works. Office, 45 & 47 Exchange Place; P. O. box No. 48.

NEW YORK, 16*th May*, 1883.

Mess. Brown, Bonnell & Co. to the Rossie Iron Works, Dr.

For ores set, viz:

1882.						
	888,835 lbs. Cal.	=	396^{1795}			
Dec. 15.	134,450 Keenc.	=	60^{50}			
			456^{1845}	B. at mine ------		$1,370 46
1883.						
Jan'y 15.	582,640 Cal.	=	260^{240}	$3 at mine ------		780 32
Febr'y 15.	20,400 "	=	9^{240}	" ------		27 32
						2,178 10

18 And afterwards, to wit, on the 29th day of May, the following petition and claim of the Florence Mining Company was filed in this cause, and which is in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON COMPANY and Others
against
BROWN, BONNELL & COMPANY. } In Equity.

The Statement of Facts, Claim, and Charge of the Florence Mining Company.

The Florence Mining Company alleges that it is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and has its principal place of business at the City of Milwaukee, in said State.

That on or about the 13th day of February, 1882, the Florence Mining Company and Brown, Bonnell & Co., the defendant in the above-entitled cause, made an agreement in writing for the sale and delivery of certain iron ore, a copy of which agreement is annexed hereto, marked Schedule A, and made a part hereof.

That the Florence Mining Company has duly performed all the conditions of said agreement on its part to be performed.

That during the season of navigation of 1882 said mining Company caused 30,000 gross tons of the iron ore in said agree-
19 ment mentioned to be shipped, consigned to itself, at the places in said agreement mentioned, and from time to time and until on or about the 19th day of February, 1883, when said Brown, Bonnell & Co. became insolvent, caused said ore to the amount of 20,762 tons to be forwarded, as requested, to said Brown, Bonnell & Co. from the docks in the agreement mentioned.

That said Florence Mining Company has been at all times ready and willing to deliver to said Brown, Bonnell & Co. the remainder of said 30,000 tons of iron ore upon request of said Brown, Bonnell & Co. and upon performance by it of the conditions and terms of said agreement, but that by reason of the insolvency of said Brown, Bonnell & Company and the appointment of the receiver in the above-entitled cause said Brown, Bonnel & Co. have been and are now, as your petitioner is informed and believes, wholly unable to take and pay for 9,238 tons of iron ore, being the remainder of said 30,000 tons of iron ore undelivered, the market value of which said undelivered ore does not exceed the sum of $4.50 per ton.

That under and by the terms of said agreement said Brown, Bonnell and Co. became indebted to the Florence Mining Company in the sum of one hundred seventy-two thousand and five hundred dollars ($172,500), together with the interest, at the rate of six per cent. per annum, upon the several installments thereof as they became due and payable under and according to the terms of said agreement, no part of which has been paid except the sum of sixty-six thousand five hundred and seven and $\frac{53}{100}$ dollars, said sum being the installments due by the terms of said agreement on the 15th

day of May, 1882, the 15th June, 1882, and the 15th July,
20 1882, with interest on said installments, respectively, from their maturity until they were paid, as appears in "Exhibit B," annexed hereto.

That said Brown, Bonnell & Co. made and delivered to the Florence Mining Company on account of said indebtedness its promissory notes particularized in Schedule B, annexed hereto, and also for the same purpose endorsed and delivered Florence Mining Company the promissory notes made by Herbert C. Ayer under the name of J. V. Ayer's Sons, payable to said Brown, Bonnell & Company, particularized in said Schedule B, annexed hereto.

That said Florence Mining Company is now the owner and holder of all of said notes in said Schedule B mentioned, except those therein mentioned as paid, being the amount of the May, June, and July payments under said contract, and no part of any of said notes has been paid or collected, and no proceedings at law or otherwise have been had to collect the said notes or any of them except such of the notes made by said Herbert C. Ayer and endorsed by said Brown, Bonnell & Company to said Florence Mining Company as have matured.

That in respect of said last-mentioned notes the Florence Mining Company alleges that at maturity they were duly presented for payment and payment thereof duly demanded and refused, and the same were duly protested for non-payment; of all which said Brown, Bonnell & Co. had due notice, and due diligence has been used by said Florence Mining Company to collect said last-mentioned notes by the institution and prosecution of actions thereon against said Herbert C. Ayer for the recovery of the amount thereof, and said actions are now pending and undetermined, and no part
21 of said notes has been paid or collected, and said actions, as well as any action which might or could be commenced on said notes or any of them, would be wholly unavailing by reason of the insolvency of said Ayer, as said company is informed and verily believes; that in and about protesting of said last-mentioned notes for non-payment and in commencing and prosecuting said actions thereon said Florence Mining Company has laid out and expended a large sum of money and will be obliged to expend further sums in the prosecutions of said actions and other actions on said notes as they mature.

That on or about the 17th day of February, 1883, the said Brown, Bonnell & Company made its check upon the Importers' & Traders' National Bank, New York city, payable to the Florence Mining Company, in the sum of 10,000 dollars, and delivered the same to the Florence Mining Company.

That said Florence Mining Company caused said check to be duly presented for payment, but payment thereof was refused.

That at the time of making said check said Brown, Bonnell & Co. deposited with the said bank for discount commercial paper in amount sufficient, together with the cash then on deposit to its credit, to pay said check, and made said deposit, as said Florence

Mining Company is informed & believes, for the express purpose of providing for the payment of said check.

That said commercial paper or its proceeds and said cash on deposit as aforesaid has since come to the posession of the receiver appointed in the above-entitled cause, as said Florence Mining Company is informed & believes, and no part thereof has been paid to said Florence Mining Company.

22 And therefore said Florence Mining Company claims that there is now due and owing from said Brown, Bonnell & Co. to it the sum of 111,322.41 dollars as principal and interest thereon, according to the terms of said several notes, together with all disbursements & expenses necessarily incurred and hereafter to be incurred in and about said actions against said Herbert C. Ayer now commenced and such as said Florence Mining Company may hereafter be obliged to commence on said notes or any of them, as more fully appears from the statement hereto annexed, marked "Exhibit B;" that Brown, Bonnell & Company are entitled to credit on said amount the value of said 9,238 tons of said iron ore undelivered, at the market value, *of* which value does not exceed $4.50 per ton, amounting to 41,571.00 dollars.

And said Florence Mining Company charges that it is entitled to the amount received as aforesaid by the receiver in the above-named cause from the Importers' & Traders' National Bank, being the amount deposited by said Brown, Bonnell & Company to provide for the payment of said check, to wit, $10,000.00, to be applied when received as a partial payment on the amount due said Florence Mining Company.

Wherefore said company prays that the said claim may be adjudged to be a valid claim against the property and assets of said Brown, Bonnell & Co., and that the amount of said check may be delivered to said company to be applied on account of said indebtedness, and that from the sale of such property and assets the

23 remainder of said claim, with interest, may be paid under such orders and decrees as the court shall deem equitable and just, and for all such other and further relief as your petitioner may in equity be entitled to.

FLORENCE MINING COMPANY,
By GEO. D. VAN DYKE, *Secretary.*

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Geo. D. Van Dyke, being duly sworn, says that he is secretary of the Florence Mining Company, and that the allegations of the foregoing petition are true to the best of his knowledge, information, and belief.

GEO. D. VAN DYKE.

Sworn to before me and subscribed in my presence this 16th day of May, A. D. 1883.

WM. D. VAN DYKE,
Notary Public, Mil. Co., Wis.

[SEAL.]

24 *Ore Contract.*

Agreement between the Florence Mining Company, of Milwaukee, Wisconsin, by its agent, H. P. Lillibridge, of Cleveland, O., and Brown, Bonnell & Company, of Youngstown, Ohio, made at Cleveland, O., 13th February, 1882, witnesseth :

That the said Florence Mining Company, for the consideration hereinafter named, hereby agrees to sell to the said Brown, Bonnell & Company thirty thousand (30,000) gross tons of Florence iron ore of its standard quality, delivered at Cleveland and Ashtabula, during the season of navigation of 1882, on the docks of the N. Y., P. & O. R'y Co. or the L. S. & M. S. R'y Co., and as near one-sixth of the total quantity per month as practicable.

It is especially agreed by the parties hereto that every possible effort shall be made, in accordance with the judgment of the officers of said Florence Mining Company, for the fulfillment of this contract for the delivery of said ore; but if prevented or obstructed by accidents or hinderances on the road or at the mines, or by combinations, strikes, or turn-outs among the miners or other laborers, or by other unavoidable occurrences, or if ore is lost by disasters of navigation too late to be replaced, said Florence Mining Company shall not be liable for damages resulting therefrom ; said ore to be paid for by the said Brown, Bonnell & Company at the rate of five & $\frac{75}{100}$ dollars per ton, in eight equal payments of $21,562.50 each, payable on the 15th days of May, June, July, August, September, October, November, and December next, respectively, in cash, all in funds par in Cleveland or New York, making a total of one hundred & seventy-two thousand — dollars ($172,500.00).

25 The said ore is to be consigned to Florence Mining Company and to be subject to their order until forwarded from docks. It is further agreed that the promissory notes of Brown, Bonnell & Co., drawn at four months from date, on which a cash payment is due, with interest at the rate of six per cent. per annum addedin to face of note (making it $21,993.75), may be substituted for either of the above cash payments except the last two, due in November and December next, which are to be paid only in cash.

Said Brown, Bonnell & Company for the above-named considerations hereby agrees to buy, receive, and pay for said ore as above mentioned.

(Signed) FLORENCE MINING CO.,
By H. P. LILLIBRIDGE, *Agent.*

(Signed) BROWN, BONNELL & CO.,
By F. H. MATHEW, *Tr. & V. P.*

Signed in triplicate.

26 Note of Brown, Bonnell & Co., dated May 15, '82, at 4 mos. 14,481 91
" " " " 15, '82, at 4 mos. 7,522 62
22,004 53

Amount of above notes, $22,004.53, and interest, 526.28, was received by note of Brown, Bonnell & Co., dated Sept. 18, '82, at 4 months (which renewal note was paid at maturity, being payment under contract due May 15, '82) 22,530 81

Note of Brown, Bonnell & Co, dated June 15, '82, at 4 months (paid at maturity, being payment under contract due June 15, '82) 22,004 53

Note of Brown, Bonnell & Co., dated July 15, '82, at 4 mos. (paid at maturity, being payment under contract due July 15, '82) 21,972 19

Note of Brown, Bonnell & Co., dated Aug. 15, '82, at 4 months 21,993 75

Amount of above note, $21,993.75, and int., $628.66, was renewed by note of John D. Ayer & Sons Dec. 11, '82; payable Apr. 24, '83; endorsed

B. Bonnell & Co., due 24–27 5,655 60
" " " " " 27, '83; "

due 27–30 5,655 60
" " " " May 25, '83; "

due 25–28 5,655 60
" " " " " 28, '83; "

due 28–31 5,655 60

and were on account of installment due Aug. 15, '82, as per contract.

Note of Brown, Bonnell & Co., dated Sept. 15, '82, at 4 months 21,993 75

Am't of above note, $21,993.75, and int., $594.44, was renewed by note John D. Ayers & Sons, dated Jan. 10, '83; payable May 18, '83; endorsed

by B. Bonnell & Co., 18–21 5,647 05
" " " " " 20, '83; "

do., 20–23 5,647 05
" " " " " June 18, '83; "

do., 18–21 5,647 05
" " " " " 20, '83; "

do., 20–23 5,647 04

and was on account of installment due Sept. 15, '82, as per contract.

Note of Brown, Bonnell & Co., dated Nov. 15, '82, at 4 months, due M'ch 15–18 21,993 75

and was on account of installment due Nov. 15, '82, as per contract.

Note of Brown, Bonnell & Co., dated Oct. 16, '82, at 4 months, Feb. 16–19 21,993 75

and was on account of installment due Oct. 15, '82, as per contract.

Note of John D. Ayers & Sons, dated Dec. 23, '82; payable Apr. 11, '83; endorsed by B. Bonnell & Co., 11–14 5,531 08
" " " " " " " " 14, '83;

14–17 5,531 08
" " " " " " " May 16, '83;

16–19 5,531 08
" " " " " " " " 18, '83;

18–21 5,531 07

and was on account of installment due Dec. 15, '82, as per contract.

27 THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

At a stated term of the circuit court of the United States within and for the eastern division of the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in April, being the third day of said month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and seventh—present, the Honorable Martin Welker, district judge—among the proceedings then and there had were the following, to wit:

THE MANUFACTURERS' AND TRADERS' BANK OF BUFFALO, NEW YORK, *vs.* BROWN, BONNELL & COMPANY. } 4197. Law.

WEDNESDAY, *April* 25.

Now comes the plaintiff, by Willey, Sherman and Hoyt, its attorneys, and the defendant comes not but makes default; and thereupon, neither party demanding trial by a jury, this cause was submitted to the court by the plaintiffs; and the court, being fully advised in the premises, finds that there is due the plaintiff from the defendant, Brown, Bonnell and Company, the sum of nine thousand nine hundred and seventy-three and $\frac{78}{100}$ ($9,973.78) dollars, as claimed in said plaintiff's petition. It is therefore considered by the court that said plaintiff have and recover from the said defendant said sum of nine thousand nine hundred and seventy-three and $\frac{78}{100}$ dollars ($9,973.78), with interest from the third day of April, 1883, together with their costs herein expended, to be taxed, for which execution may issue.

(Endorsed:) No. 4197. United States circuit court, northern district of Ohio, eastern division. Man'f'gs' & Traders' B'k *vs.* Brown, Bonnell & Co. Certified copy of judgment.

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of a judgment entered upon the journal or the proceedings of said court in the therein-entitled cause; that I have compared the same with the original entry of said judgment, and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Cleveland, in said district, this sixth day of June, A. D. 1883, and in the 107th year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk,*
By O. C. BEATTY, *Deputy Clerk.*

28 And afterwards, on June 6th, 1883, the following petition was filed, viz:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.* *vs.* BROWN, BONNELL & CO. } Equity No. 4195.

To the honorable judges of said court:

Your petitioner, The Manufacturers' and Traders' Bank of the City of Buffalo, of New York, a banking association and corporation duly

organized under the laws of said State, who reside and do business at the city of Buffalo, State of New York, respectfully show that this petition is filed in the above-entitled cause in pursuance of an order of said court hereinbefore made; that said bank is a creditor of the said defendant, Brown, Bonnell & Co., of Youngstown, Ohio, in the sum of nine thousand nine hundred and seventy-three & $\frac{78}{100}$ dollars ($9,973.78); that the said claim is just and unpaid, and is described as follows, to wit, a judgment of the said circuit court rendered by said court in favor of said petitioner and against said defendant, upon the 25th day of April, A. D. 1883, together with interest thereon from the 3rd day of April, 1883, the title of said cause being The Manufacturers' and Traders' Bank of Buffalo, New York, *vs.* Brown, Bonnell & Co., said cause being numbered 4197 on the records of said court; that copy of said judgment is hereto attached and made a part of this petition.

Your petitioner further shows that it holds no security for said claim except as follows: —.

Wherefore your petitioner prays that the said claim may be adjudged to be a valid claim against the property and assets of said Brown, Bonnell & Co., and that out of the proceeds arising from the sale of such property and assets said claim may be paid under such orders and decrees as the court shall deem equitable and just, and for all such other and further relief as your petitioner may in equity be entitled to.

THE MANUFACTURERS' AND TRADERS' BANK OF BUFFALO, NEW YORK,
By JAS. H. HOYT, *Its Att'y.*

STATE OF OHIO, *Cuyahoga County,* } *ss:*

James H. Hoyt, being duly sworn, says that he is the duly authorized att'y of said petitioner; that said bank is a non-resident corporation, and that no office- or agent of said bank is a resident or now within said district, and that he is duly authorized to prove said claim and verify said petition, and that the allegations of the foregoing petition are true.

JAMES H. HOYT.

Sworn to before me and subscribed in my presence this sixth day of June, A. D. 1883.

O. C. BEATTY,
U. S. Com'r, N. D. O.

29 And afterwards, to wit, on the 14th day of June, 1883, the following order was entered in the order book in this cause, and which is in words and figures following, to wit:

LAKE SUPERIOR IRON COMPANY *et al.*
vs. } 4195.
BROWN, BONNELL AND COMPANY *et al.*

In this cause, it appearing that the defendants have failed to plead,

answer, or demur to the complainants' original or supplemental bills, it is ordered, on motion of complainants' solicitor, that said original and supplemental bills be taken as confessed by each and all of said defendants who have been served with process of subpœna therein, and that an order *pro confesso* be entered against them.

FRANCIS J. WING,
Solicitor for Complainants.

June 4th, 1883.

30 And afterwards, to wit, on Tuesday, July the 17th, 1883, the following order was made in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } 4195, Chancery.

Upon the motion of the complainants herein, merits thereof having been fully considered, it is ordered and decreed that Augustus J. Ricks be, and he is hereby, appointed a special master of this court, on account of his experience in matters of accounting, to hear and determine the rights of the several creditors of the defendant who, in accordance with a former order of this court herein made, have filed their claims with the clerk thereof; and the said Agustus J. Ricks, as such master, is ordered to take an account from the pleadings now in this cause and such other pleadings as may be filed with him as such master and from such proofs as may be produced before him, on giving the usual notice, and to ascertain what is justly due from said defendant to each and every creditor who has filed his claim in accordance with the said order of the court, and to adjudge and marshal the liens of said creditors and the priorities thereof, and to report his findings and determinations and adjudications to this court; and in performance of this order the said master shall have power to order the filing of proper pleadings before him and to compel the attendance of witnesses, and he is hereby vested with all power conferred upon masters by the rules of the court and authorized to employ a stenographer to take testimony in all proper claims.

31 And afterwards, to wit, on Friday, July the 20th, 1883, the following order was made in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } 4195, Chancery.

It appearing to the court that it will be for the advantage of the creditors of said defendant, Fayette Brown, as receiver of the defendant, is hereby authorized and directed to assign and transfer to the Pittsburgh & Lake Erie railroad, without recourse on him, said re-

ceiver, or upon said Brown, Bonnell & Co., all the right and interest of said receiver and of Brown, Bonnell and Company in and to a certain indebtedness upon an open account existing in favor of said defendant and against a firm known as Graff, Bennett and Company. Such assignment and transfer shall be made, however, upon the condition that credit to the full amount of said account be given by said Pittsburgh and Lake Erie railroad on its claim against the said defendant, Brown, Bonnell and Company, and that such assignment and transfer is taken by said Pittsburgh and Lake Erie railroad as payment of its said claim against said defendant to the full amount of said account so to be transferred.

32 In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON COMPANY *et al.* *vs.* BROWN, BONNELL & CO. } In Equity. No. 4195.

Report of the Special Master upon the Petition and Claim of the Florence Mining Company.

Under an order of our circuit court, entered in this cause at the April term thereof, the undersigned was appointed special master to report upon the various claims filed by the creditors of defendant, and, in case of disputed claims, to ascertain the sum due the petitioners and the nature of the lien, if any, claimed.

The Florence Mining Company, on the 29th day of May, A. D. 1883, filed its petition in this case against the defendant, claiming a sum due on ore delivered to the defendant upon a contract set forth in its petition and an additional sum due as damages for failure of the defendant to carry out on its part the terms of said contract.

By consent of counsel it was agreed that the hearing should proceed as though an answer making a general denial of the allegations of the petition had been filed. The master was attended by counsel during the taking of the testimony, and the case was submitted on briefs prepared with great ability by the counsel for respective parties.

The facts as presented by the evidence are that on the 13th day of February, 1882, the Florence Mining Company and the defendant, Brown, Bonnell & Company, entered into a written con-
33 tract by the terms of which the Florence Mining Company, as vendor, agreed to sell to Brown, Bonnell & Co., as vendee, thirty thousand tons of Florence iron ore of its standard quality, deliverable at Cleveland and Ashtabula during the season of navigation of 1882, on the docks of the New York, Pennsylvania & Ohio Railroad Company or the Lake Shore & Michigan Railway Company, and as near one-sixth of the total quantity per month as practicable; said ore to be paid for by the vendee at the rate of five and seventy-five one-hundredths dollars per ton, in eight equal payments of $21,562.50 each, payable on the fifteenth days of May,

June, July, August, September, October, November, and December, 1883, respectively, in cash, making in all $172,500.00. Said ore was to be consigned to the vendor and to be subject to its order until forwarded from the docks. Other provisions of the contract not material to the case need not be recited.

Under said contract the vendor had delivered to the vendee prior to February 19th, 1883, twenty thousand seven hundred and sixty-two tons of the ore specified, and the same had been accepted by the vendee. On the 20th day of February, 1883, the defendant company passed into the custody of a receiver by order of this court, and by that proceeding and from that day was fairly adjudged insolvent. On the day preceding the appointment of said receiver the vendor temporarily suspended shipment of ore in the usual course of its delivery under fear of the insolvency of the vendee, which fear was confirmed on the day following by the proceeding of this court to which I have just referred. Up to the time the vendor suspended delivery as aforesaid the contract, varied in some particulars by mutual consent, had been complied with by both parties. At that time 9,238 tons of the iron ore had not been delivered to the
34 vendee. The vendor failed to deliver that balance or any part thereof because of the insolvency of the vendee, but claims to have had the ore ready for delivery, and that it would have been delivered had the vendee offered to perform its part according to contract. The vendee, upon the failure of the vendor to continue its delivery of the ore, did not make any demand for further delivery and by its action fairly gave evidence of desire to rescind the contract. Under these circumstances the vendor had the right to concur in the vendee's wish to rescind and treat the contract as at an end or it had the right to refuse to rescind and insist upon enforcing the contract. It claims to have done the latter and asks to prove its claim for the full amount due under the contract and credit the vendee with the value of the undelivered ore at the market price at the time of the appointment of the receiver. The vendee claims that the conduct of the vendor in failing to continue its delivery upon credit under the contract to it or its receiver was equivalent to concurring in the vendor's virtual proposition to rescind the contract. If the vendor had elected to stand to its contract it was bound to deliver according to the contract—*i. e.*, on credit. The insolvency of the vendee did not alter the terms of the contract so as to authorize the vendor to insist upon delivery for cash. If the vendee after insolvency had demanded that the contract be fulfilled it could only have insisted upon a delivery for cash, for it could not compel a vendor to sell to an insolvent upon credit when by its conduct it had given the vendor the privilege to rescind; but if the vendor insists upon enforcing a contract to sell upon credit to an insolvent vendee it can only demand notes provided for in the contract. This seems clear from the reasoning of the court (Brett, J.) in Morgan *vs.*
Bain. So that in this case if the vendor intended to elect to
35 enforce the contract it should have offered to deliver under the contract upon credit, and having failed to do so I am of the opinion that by its action it elected to concur in the rescission

of the contract, as the vendee by its conduct may fairly be held to have offered to do. Had the contract provided for cash on delivery of the ore the vendor would unquestionably have held the right to make tender for cash, and on refusal to accept and to pay cash on part of the vendee the vendor could have sold the undelivered ore at the market price at the time of the breach and have offered to credit on vendee's notes the sum so realized by such sale; but the vendee having contracted to pay for the ore in its notes the vendor, if it intended to insist upon enforcing the contract, should have tendered the ore on credit according to the contract.

The contract having therefore by act of both parties been rescinded, I am of the opinion that there should be credited upon the balance due upon the notes given by the vendee, viz., $111,322.41, the value of 9,238 tons undelivered ore, at the contract price, $5.75 per ton, viz., $53,118.50, with interest from the first day of March, 1883, which would have been a reasonable time within which the parties should have expressed their election to enforce or rescind the contract.

I do not think the Florence Mining Company has waived any right to claim the full sum, as above indicated, by reason of having accepted the notes of J. V. Ayer's Sons endorsed by Brown, Bonnell & Co. in lieu of the original notes of Brown, Bonnell & Co.

I do not think the Florence Mining Company has any lien upon the fund or notes that was in the hands of the Importers' & Traders' National Bank of New York City on or about the 17th day of February, 1883, at which time the vendee made its check, $10,000, payable to the vendor, or that any such lien attaches to said
36 fund and notes that subsequently came into the hands of the receiver.

I herewith submit all the evidence taken upon this claim.

All of which is respectfully submitted.

A. J. RICKS,
Special Master.

37 And afterwards, to wit, on the 21st day of Nov., 1883, the following exceptions of the Florence Mining Co. to the findings of the special master in this cause —, and which *is* in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON CO., JACKSON Iron Co., & Negaunee Concentrating Co.
vs.
BROWN, BONNELL & COMPANY.

Exceptions of the Florence Mining Co. to Com'r's Report on Its Claims.

Now comes the Florence Mining Company, by Harvey D. Goulden, its solicitor, and excepts to the findings and report of A. J. Ricks, Esq., commissioner, upon the claim of said Florence Mining Company against said Brown, Bonnell & Co. herein filed in the respects and for the reasons following:

1st. That the said report finds that the said Florence Mining Company agreed to abandon or acquiesced to the abandonment of the contract therein mentioned.

2nd. That the said report finds that credit should be given Brown, Bonnell & Co. upon the notes referred to at the contract price — the undelivered ore.

3. That said report does not find that credit for said undelivered ore should be given upon said notes at the market price.

4. That the said report does not find the market price at which said undelivered ore should be credited to be the sum of four and $\frac{50}{100}$ dollars ($4.50) per gross ton.

38 5. That the said report finds that the giving of the check mentioned in said report was not an equitable assignment *pro tanto* of the cash in bank and the notes sent on by Brown, Bonnell & Co. to its bank for discount, as described in said report.

6. That the said report does not find that the check referred to therein was an assignment of the cash in bank and said notes sent on for discount and their proceeds to the amount of said check.

7. That the said report does not find that the receiver should be ordered to pay over to the Florence Mining Company the sum of ten thousand dollars by reason of said check.

8. That the said report does not find that the said check operated on an equitable assignment to the Florence Mining Company of the amount of money on deposit in the said bank at the time of the appointment of the receiver.

9. And for other errors and mistakes of law and fact in the findings of the commissioner appearing in said report.

By HARVEY D. GOULDER,
Sol'r for the Florence Mining Co.

BRIEF.—A full brief on the questions involved was filed with the commissioner and is with the files of this case, to which the court is respectfully referred as my brief on the foregoing exceptions.

Respectfully submitted,

HARVEY D. GOULDER, *Solicitor.*

39 And afterwards, to wit, on Nov. 23d, 1883, a subpœna was issued in this cause, which is in words & figures following, to wit:

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Herbert C. Ayer, if he is to be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in February next, to answer a certain original and supplemental bill in chancery filed and exhibited in the said

court against him & others by the Lake Superior Iron Company, Jackson Iron Company, and Negaunee Concentrating Co.

Hereof he is not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

[SEAL.] Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 23d day of November, A. D. 1883, and in the 108th year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk*,
By —— ——, *Deputy Clerk.*

MEMORANDUM.—The said defendant is required to enter his appearance in this suit, in the clerk's office of said court, on or before the first Monday of January, 1884; otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk.*

[Endorsed:] No. 4195. United States circuit court, northern district of Ohio, eastern division. In chancery. Lake Superior Iron Co. *vs.* Brown, Bonnell & Co. *Alias* subpœna. Returnable 7th January, 1884. Rule day for appearance, 7th January, 1884. Rule day for answer, 4th February, 1884. Returned and filed February 4th, 1884. A. J. Ricks, clerk. F. J. Wing, complainants' solicitor.

NORTHERN DISTRICT OF OHIO, *ss:*

I have made diligent search and have been unable to find the within-named Herbert C. Ayer in my district; therefore have not made service.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

Fees:

Copy	50
Travel to Youngstown	4 20
" " Toledo	6 78
	$11 48

40 And afterwards, to wit, on the 24th day of Nov., 1883, the following bill of Citizens' National Bank — in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio and Eastern Division Thereof.

The honorable judges of said court:

Your orator, "The Citizens' National Bank of Pittsburgh," by leave of this court first given, represents that it is organized as a national bank under and by virtue of the laws of the United States, and is located and doing business in the city of Pittsburgh, in the

Commonwealth of Pennsylvania, and is a citizen of said State; and your orator further shows unto your honors that on the 20th day of Feb., 1883, the Lake Superior Iron Company, the Jackson Iron Company, and the Negaunee Concentrating Company filed in this court their original bill in equity against the corporation — Brown, Bonnell & Co., and by supplement thereto, filed on the 28th day of March, 1883, *making* certain additional parties thereto and certain additional allegations therein; and your orator refers to said bill and supplement for a full statement of the allegations and objects of the same; that during the pending of said proceeding this court has appointed a receiver of all the property and effects of said Brown, Bonnell & Co., and has ordered all creditors of said corporation to file their claims in the clerk's office of this court, and has referred the same to a special master to adjudge and report upon the same; that in pursuance of this order your orator has presented its claim in the manner therein provided, amounting to over sixty-eight thousand dollars, for which your orator has no security
41 except for a small part thereof in virtue of certain attachments issued in the State of Pennsylvania, which are fully described in the proofs made before the special master as aforesaid. Your orator therefore, in accordance with the scheme and objects of said bill, which is presented for the benefit of all creditors, and of the leave given as aforesaid, makes itself a party complainant thereto to the same effect as though it had joined therein when said bill and supplement were originally filed; and, referring to and adopting all the statements and representations therein made and all the proceedings thereon had, your orator prays for all the relief prayed for therein and for such other and further relief as equity and good conscience requires.

S. SCHOYER, JR.,
Solicitor for Complainant.

R. R. RANNEY, *Of Counsel.*

42 And afterwards, to wit, on the 24th day of Nov., 1883, the following motion of Citizens' National Bank was filed in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & Co. } Chancery.

Motion for Leave to Become Party Complainant & File the Bill Exhibited.

And now comes the Citizens' National Bank of Pittsburgh and moves the court for leave to become party complainant in the above cause, and files herewith its bill to make it such, and for a full statement of the reasons for this motion it refers to the representations and statements of its said bill and the references therein made.

R. R. RANNEY,
Of Counsel for said Bank.

43 And afterwards, to wit, on the 24 day of Nov., 1883, the following demurrer was filed in this cause, and which is in words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Northern District of Ohio.

In the Circuit Court.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & CO.

The demurrer of Ralph J. Wick, defendant, to the bill of complaint of The Lake Superior Iron Co., the above-named plaintiff.

This defendant, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that *because* it appears by the bill that under the acts of Congress the court has no jurisdiction to proceed in the action.

Wherefore and for divers other causes of demurrer appearing in the said bill the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answers to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

H. CRAWFORD, WILLEY, SHERMAN & HOYT,
A. W. JONES, *Att'ys for Def't.*

44 NORTHERN DISTRICT OF OHIO:

A. W. Jones, being sworn, on oath says that this demurrer is not filed for delay.

A. W. JONES.

Subscribed and sworn to before me this 24th day of November, 1883.

A. J. RICKS, *Clerk.*

In my opinion this demurrer is well founded in point of law.

A. W. JONES &
H. CRAWFORD.

45 And afterwards, to wit, on the 24th day of Nov., 1883, the following bill was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio and Eastern Division Thereof.

To the honorable judges of said court:

Your orator, The Importers' and Traders' National Bank of New

York, by leave of this court first given, represents that it is organized as a national bank under and by virtue of the laws of the United States, and is located and doing business in the city of New York, in the State of New York, and is a resident and citizen of said State; and your orator further shows to your honors that on the 20th day of February, 1883, the Lake Superior Iron Company, the Jackson Iron Company, and the Negaunee Concentrating Company filed in this court their original bill in equity against the corporation of Brown, Bonnell & Co., and by supplement thereto, filed on the 28th day of March, 1883, made certain additional parties thereto and certain additional allegations therein, and reference is here made to said bill and supplemental bill for a full statement of the allegations and objects of the same; that during the pending of said proceeding this court has appointed a receiver of all the property and effects of said Brown, Bonnell & Co., and has ordered all creditors of said corporation to file their claims therein against said Brown, Bonnell & Co. in the clerk's office of this court, and has referred the same to a special master to adjust and report upon the same; that in pursuance of this order your orator has presented its claim in the manner therein provided, amounting to sixty-
46 • three thousand dollars and over, for which your orator has no security.

Your orator therefore, in accordance with the scheme and objects of said bill, which is prosecuted for the benefit of all creditors, and of the leave given as aforesaid, hereby *making* itself a party complainant thereto to the same effect as though it had joined therein when said bill and supplement were originally filed; and, referring to and adopting all the statements, representations, and allegations therein made and all the proceedings therein had, your orator prays for all the relief prayed for therein and for all such other and further relief as equity and good conscience requires.

L. W. FORD,
Solicitor for Complainant.

C. C. BALDWIN, *Of Counsel.*

47 And afterwards, to wit, on the 24 day of Nov., 1883, the following motion and suggestions *was* filed in this cause, and which *is* in words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Ohio. }

In the Circuit Court.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & CO.

Motion by John Hay and Samuel Mather, Executors of A. Stone.

Now come the said John Hay and Samuel Mather, executors, and suggest to the court that the said Amasa Stone has during the

pendency of this action and since the filing of the bill and supplemental bill herein departed this life, and that they, the said John Hay and Samuel Mather, are the duly appointed, qualified, and acting executors of the estate of said defendant, Amasa Stone.

And said executors move the court that they may be made parties defendant herein and may be permitted as such executors to answer and file therein claims in this action.

R. R. RANNEY,
JOEL W. TYLER,
A. ST. J. NEWBURRY,
Att'ys for said Executors.

48 And afterwards, to wit, on the 26th day of Nov., 1883, the following bill was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY.

To the honorable judges of said court:

Your orator, "The Rossie Iron Works," which is a corporation organized and existing under the laws of the State of New York and doing business in Jefferson county, in — State, and a resident and citizen of the State of New York, respectfully shows unto your honors that the above-named complainants filed their original bill in this cause on *this* 20th of Feb., 1883, and on the 28th day of March filed a supplemental bill by which additional parties and certain additional allegations are made, and your orator hereby refers to and makes part hereof by reference all and singular the allegations of said original and supplemental bills of complaint; that during the pendency of this cause the court has appointed a receiver for the property of said Brown, Bonnell & Co., and that said receiver now has possession thereof and is operating and conducting, under the order of the court, the business of said corporation; that, by order of this court made April 23rd, 1883, all creditors of said corporation of Brown, Bonnell & Co. were ordered to file in this cause their verified petitions setting forth the amount and the nature of their claims, which said claims have been
49 referred to a special master to audit and report upon the same.

Your orator further says that it is a creditor of said Brown, Bonnell & Co., and that said company is indebted to it in the sum of $8,432.03, with interest, upon a certain promissory note and on account for wares and merchandise sold to said Co.; that your orator did, on the 17th of May, 1883, in compliance with said order of the court, file in the clerk's office its said claim, and afterwards the same was examined and approved by the said special master to *re-*

turn the same had been referred as aforesaid. Your orator further says that it holds no security for said claim, and is without adequate remedy at law — enforce the same; wherefore your orator, by leave of court, makes itself party complainant herein as fully in all respects as if made so by the original bill, and it prays that the relief prayed for by said original and supplemental bills may be presented, and that the court will grant such other and further relief in the premises as equity requires.

THE ROSSIE IRON WORKS,
By BURKE, INGERSOLL & SANDERS,
Its Attorneys.

THE UNITED STATES OF AMERICA, *Northern District of Ohio:*

Chas. R. Westbrook, being duly sworn, says that he is the superintendent of said above-named Rossie Iron Works, which is a corporation of the State of New York, and all officers of said corporation are now absent from this district. Affiant says he is familiar with the facts stated in the foregoing bill and has read the same, and the statements thereof are true, as he verily believes.

CHAS. R. WESTBROOK.

50 And afterwards, to wit, on the 26th day of Nov., 1883, the following order was entered in the order book in this cause, and which is in words and figures following, to wit:

United States Circuit Court, Northern District of Ohio.

LAKE SUPERIOR IRON CO. *et al.* *vs.* BROWN, BONNELL & CO. } Equity, No. 4195.

In this cause, upon motion of the Citizens' National Bank of Pittsburgh, Pennsylvania, it is ordered that it become a party complainant in this case, as prayed for in its bill filed herein, for which filing leave is hereby granted.

Done at chambers, at Wooster, in said district, on this 26th day of November, A. D. 1883.

(Signed) M. WELKER,
Dist. Judge U. S.

51 And afterwards, to wit, on the 26th day of November, 1883, the following order was entered in the order book in this cause, and which is in words and figures following, to wit:

United States Circuit Court, Northern District of Ohio.

LAKE SUPERIOR IRON CO. *et al.* *vs.* BROWN, BONNELL & CO. } Equity, No. 4195.

In this cause, upon motion of the Importers' and Traders' National Bank of New York, it is ordered that it become a party complainant

in this case, as prayed for in its bill filed herein, for which filing leave is hereby granted.

Done at chambers, in Wooster, in said district, on this 26th day of November, A. D. 1883.

(Signed) M. WELKER,
Dist. Judge U. S.

52 And afterwards, to wit, on the 26th day of Nov., 1883, the following motion was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY *et al.*

Now come the complainants, by their solicitors, and move the court to strike from the files the demurrer filed by Ralph J. Wick, defendant herein, and the motion filed by Frank H. Mathews, John I. Williams, Frank B. Williams, and A. W. Jones, for the reason that the same were filed irregularly and in violation of the rules of this court.

FRANCIS J. WING.

53 And afterwards, to wit, on the 26th day of Nov., 1883, the following motion was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY.

Now come the complainants herein, by their solicitors, and move the court to strike from the files the pleas of the corporation, defendant, filed November 24th, 1883, for the reason that the same was filed irregularly and in violation of the rules of this court.

FRANCIS J. WING,
Solicitor for Complainants.

54 And afterwards, to wit, on the 1st of December, 1883, the following answers and cross-bill *was* filed in this cause and which *is* in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

The joint and several answers and cross-bill of Commercial National Bank, Charles A. Otis, William H. Harris, Dan. P. Eells; John Hay and Samuel Mather, executors of estate of Amasa Stone, deceased, and Dan. P. Eells and John Hay, trustees, defendants, to the bill and supplemental bill of complaint of the Lake Superior Iron Company *et al.*, complainants.

And now comes the Commercial National Bank, a national banking association, duly incorporated and organized under and by virtue of the laws of the United States of America; Chas. A. Otis, William H. Harris, Dan. P. Eells, and John Hay and Samuel Mather, as executors of the estate of Amasa Stone, deceased, said Stone having died since the commencement of this suit leaving a will wherein he appointed said Hay and Mather executors thereof, which will was on the — day of —— duly admitted to probate in the probate court of Cuyahoga county, Ohio, and letters testamentary were on the — day of —— by said court duly issued thereon to the said Hay and Mather, who thereupon duly qualified and entered on the duties of their said office; and also now come the said Dan. P. Eells, trustee, and the said John Hay, trustee, and, by way of answer and cross-bill to the original bill and supplemental bill of the complainants filed in this cause, says—

That the defendant, Brown, Bonnell & Co., is indebted to them and each of them, respectively, and that said indebtedness is
55 secured to them as hereinafter set forth.

Said Commercial National Bank, at the request of said Brown, Bonnell & Company, discounted eleven separate promissory notes, made by John V. Ayer's Sons, of Chicago, Illinois, to the order of and endorsed by said Brown, Bonnell & Company.

One of said notes dated Sept. 15th, 1882, for the sum of $5,583.14, payable at the Union National Bank on Feb. 20, 1883, and due Feb. 23, 1883.

Another of said notes dated Dec. 30th, 1882, for the sum of $5,511.74, payable at the Union National Bank on May 19th, 1883, and due May 22, 1883.

Another of said notes dated Dec. 30th, 1882, for the sum of $5,546.72, payable at the Union National Bank on May 21st, 1883, and due May 24th, 1883.

Another of said notes dated Dec. 30, 1882, for the sum — $5,591.67, payable at the Union National Bank on May 22nd, 1883, and due May 25th, 1883.

Another of said notes dated December 30, 1882, for the sum of $5,636.19, payable at the Union National Bank on May 23, 1883, and due May 26th, 1883.

Another of said notes dated Dec. 30, 1882, for the sum of $5,673.29, payable at the Union National Bank on May 25, 1883, and due May 28, 1883.

Another of said notes dated Jan. 31, 1883, for the sum of $5,791.11, payable at the Union National Bank on June 17, 1883, and due June 20, 1883.

Another of said notes dated Jan. 31, 1883, for the sum of $5,643.12, payable at the Union National Bank on June 18, 1883, and due June 21, 1883.

56 Another of said notes dated Jan. 31, 1883, for the sum of $5,511.22, payable at the Union National Bank on June 19, 1883, and due June 22, 1883.

Another of said notes dated Jan. 31, 1883, for the sum of $5,510.86, payable at the Union National Bank on June 20, 1883, and due June 23, 1883.

Another of said notes dated Jan. 31, 1883, for the sum of $4,880.38, payable at the Union National Bank on June 22, 1883, and due June 25, 1883.

That said notes were duly presented for payment at the times and at the places where they were respectively made payable, of all of which said Brown, Bonnell & Co. had due notice, the aggregate face value of said notes being $60,879.44; and they also paid fees for the protest of one of said notes, due February 23, 1883, amounting to $2.30, making a total of $60,881.74, less an amount paid by said last-named company on one of said notes, due Feb. 23, 1883, of the sum of $778.80, leaving a balance of $60,102.94, no part of which has been paid by John V. Ayer's Sons, nor by said Brown, Bonnell & Company, and the same is still due to said Commercial National Bank, with interest on each of the sums for which said notes were given from the time they respectively became due. Copies of said notes with all endorsements thereon are hereto attached, marked respectively Exhibits A, B, C, D, E, F, G, H, I, J, and K, and reference made thereto; that said Dan. P. Eells, at the request of said defendant, Brown, Bonnell and Company, endorsed for the accommodation of said company five certain promissory notes described as follows:

One of said notes dated October 19, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, O.,

57 on March 21, 1883, and due March 24th, 1883.

Another of said notes dated November 18, 1883, for the sum of $8,333.33, payable at the Commercial National Bank, Cleveland, Ohio, four months after date, and due March 21, 1883.

Another of said notes dated Dec. 18, 1882, for the sum of $6,250, payable at Commercial National Bank, Cleveland, Ohio, on April 18, 1883, and due April 21, 1883.

Another of said notes dated Dec. 18, 1882, for the sum of $6,250, payable at Commercial National Bank, Cleveland, Ohio, on May 22, 1883, and due May 25, 1883.

Another of said notes dated Dec. 24, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, on Apr. 23, 1883, and due April 26, 1883.

All of which notes were executed by Brown, Bonnell & Company to the order of said Dan. P. Eells and endorsed by him for the accommodation of said company as aforesaid, and which said notes

said Brown, Bonnell and Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. Said notes were duly presented for payment at the times when and the places where they were respectively made payable; of all which said Brown, Bonnell and Company had due notice, but said company failed to pay said notes or any one of them when they respectively became due and payable as aforesaid, and said Eells has been compelled to pay and has paid to the holders of said promissory notes the sums so due by the terms of each respectively, amounting in the aggregate to the sum of $37,499.66; of all which said
58 Brown, Bonnell and Company had due notice; no part of which said sum has been paid by said Brown, Bonnell and Company, and the same is still due to said Eells, with interest on each of the sums for which said notes were given from the time when they respectively became due. Copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits L, M, N, O, and P respectively, and reference made thereto.

That said Charles A. Otis, at the request of said Brown, Bonnell and Company, endorsed for the accommodation of said company eight certain promissory notes executed by said Brown, Bonnell and Company to the order of said Charles A. Otis and by him endorsed as aforesaid. Said notes are described as follows:

One of said notes, dated Dec. 4, 1882, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on Apr. 16, 1883, and due Apr. 19th, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum of $5,000, payable at Commercial National Bank, Cleveland, Ohio, on Apr. 17th, 1883, and due April 20, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, O., on April 18, 1883, and due April 21, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum of $10,000.00, payable at Commercial National Bank, Cleveland, O., on Apr. 20th, 1883, and due April 23rd, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on May 15, 1883, and due May 18th, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum $5,000.00, payable at Commercial — Bank, Cleveland, Ohio, on May
59 16th, 1883, and due May 18th, 1883.

Another of said notes, dated Dec. 4, 1883, for the sum of $5,000.00, payable at Commercial National Bank, Cleveland, Ohio, on May 18, 1883, and due May 21st, 1883.

Another of said notes, dated Dec 4, 1883, for the sum of $10,000.00, payable at Commercial National Bank, Cleveland, O., on May 19, 1883, and due May 22nd, 1883.

All of which said notes said Brown, Bonnell and Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. The aggregate face value of said notes amounted to the sum of $50,000.00.

Said notes were duly presented for payment at the times when and

the places where they were respectively made payable, of all which said Brown, Bonnell & Company had due notice; but said company failed to pay said notes or any one of them when they respectively became due and payable as aforesaid, and said Charles A. Otis has been compelled to pay and has paid to the holders of said promissory notes the sums so due by the terms of each, respectively, amounting in the aggregate to the sum of $50,000, all of which said Brown, Bonnell and Company had due notice, no part of which said sum of $50,000.00 has been paid by said Brown, Bonnell and Company, and the same is still due to said Otis, with interest on each of the sums for which said notes were given from the time when they respectively became due; copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits Q, R, S, T, U, V, W, and X, respectively, and reference made thereto.

That said William H. Harris endorsed, at the request of Brown, Bonnell and Company, for the accommodation of said company, certain promissory notes executed by said Brown, Bonnell and Company to the order of said William H. Harris and by him endorsed for the accommodation of said company as aforesaid. Said notes are described as follows:

60

One of said notes, dated Oct. 19, 1882, for the sum of $8,333.34, payable at Commercial National Bank, Cleveland, Ohio, on March 23, 1883, and due March 26th, 1883.

Another of said notes, dated Nov. 18, 1882, for the sum of $8,333.34, payable at Commercial National Bank, Cleveland, Ohio, four months after date, and due March 21, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum of $8,333.00, payable at Commercial National Bank, Cleveland, O., on April 24th, 1883, and due April 27th, 1883.

Another of said notes, dated Dec. 18, 1882, for the sum of $6,250, payable at Commercial National Bank, Cleveland, Ohio, on April 24th, 1883, and due April 27, 1883.

Another of said notes, dated Dec. 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, O., May 23, 1883, and due May 26th, 1883.

All of which said notes said Brown, Bonnell and Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. The aggregate face value of said notes amounted to the sum of $37,499.68.

Said notes were duly presented for payment at the times when and the places where they were respectively made payable, of all which said Brown, Bonnell and Company had due notice; but said company failed to pay said notes or any one of them when they respectively became due and payable as aforesaid, and said William H. Harris has been compelled to pay and has paid to the holders of said promissory notes the several sums so due by the terms of each, respectively, amounting in the aggregate to the sum of $37,499.68, of all which said Brown, Bonnell and Company had due notice, no part of which said sum of $37,499.68 has been paid by said Brown, Bonnell and Company, and the same is still due to said Harris, with interest on each of the sums for which said

61

notes were given from the time when they respectively became due; copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits 1, 2, 3, 4, and 5, respectively, and reference made thereto.

That said Amasa Stone, during his lifetime, at the request of said Brown, Bonnell and Company, for the accommodation of said company, endorsed five certain promissory notes executed by said Brown, Bonnell and Company to the order of said Amasa Stone and by him endorsed for the accommodation of said company as aforesaid. Said notes are described as follows:

One of said notes, dated Nov. 18, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, four months after date, and due March 21, 1883.

Another of said notes, dated Dec. 4, 1882, for the sum of $8,333.00, payable at Commercial National Bank, Cleveland, Ohio, on April 21, 1883, and due April 24th, 1883.

Another of said notes, dated Dec. 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, O., on April 17, 1883, and due April 20th, 1883.

Another of said notes, dated Dec. 18, 1882, for the sum of $6,250.00, payable at Commercial National Bank, Cleveland, Ohio, on May 16, 1883, and due May 19th, 1883.

62 Another of said notes, dated Oct. 19, 1882, for the sum of $8,333.33, payable at Commercial National Bank, Cleveland, Ohio, on March 19, 1883, and due March 22nd, 1883.

All of which said notes said Brown, Bonnell and Company negotiated by getting the same discounted, and thereby received the face value thereof, less discount. The aggregate face value of said notes amounted to the sum of $37,499.66. Said notes were duly presented for payment at the times when and the places where they were respectively made payable, of all which said Brown, Bonnell and Company had due notice; but said company failed to pay said notes or any one of them when they respectively became due and were presented for payment as aforesaid, and said Amasa Stone was compelled to pay and did pay to the holders of said promissory notes the said several sums so due by the terms — each, respectively, amounting in the aggregate to the sum of $37,499.66, of all which said Brown, Bonnell and Company had due notice, and no part of said sums of $37,499.66 has been paid by said Brown, Bonnell and Company and the same is still due to the estate of said Amasa Stone, deceased, with interest on each of the sums for which said notes were given from the time when they respectively became due; copies of which notes, with all endorsements thereon, are hereto attached, marked Exhibits 6, 7, 8, 9, and 10, respectively, and reference made thereto.

And to secure the payment of the aforesaid notes so discounted and endorsed by the respective parties above named said Brown, Bonnell and Company delivered to each of said parties certain mortgage bonds, hereinafter particularly specified, as collat-

63 eral security or pledge to secure the payment of said promissory notes and to save the endorsers harmless from the pay-

ment thereof and from all liability on account of their said respective endorsements, said bonds having been executed and delivered to Dan. P. Eells and John Hay, as trustees, or bearer by said Brown, Bonnell and Company and were for the sum of five thousand dollars each and interest thereon at the rate of six per cent. per annum, payable semi-annually, coupons or interest warrants being attached to said bonds representing said interest—

Said bonds so pledged being a part of a series of one hundred bonds, numbered consecutively from 1 to No. 100, inclusive, all of like date (being dated April 3rd, A. D. 1882) and amount and of the same tenor, except as to the time of their maturity, of which series six bonds, numbered consecutively from No. 1 to No. 6, inclusive, are payable on the 3rd day of April, 1884; seven bonds, numbered consecutively from No. 7 to 13, inclusive, are payable on the third day of April, 1885; eight bonds, numbered consecutively from No. 14 to 21, inclusive, are payable on the 3rd day of April, 1886; nine bonds, numbered consecutively from No. 22 to 30, inclusive, are payable on the 3rd day of April, 1887; ten bonds, numbered consecutively from No. 31 to 41, inclusive, are payable on the 3rd day of Apr., 1888; twelve bonds, numbered consecutively from No. 42 to 53, inclusive, are payable on the 3rd day of April, 1889; fourteen bonds, numbered consecutively from No. 53 to 66, inclusive, are payable on the 3rd day of April, 1890; sixteen bonds, numbered consecutively from No. 67 to 82, inclusive, are payable on the 3rd day of April, 1891, and eighteen bonds, numbered consecutively from No. 83 to No. 100, inclusive, are payable on the 3rd
64 day of April, 1892, and the payment of the principal and interest of all of said bonds is secured by mortgage or deed of trust in the nature of a mortgage, bearing even date with said bonds, made by said Brown, Bonnell and Company to said Dan. P. Eells and John Hay, trustees, conveying to them in trust, for the security of the successive holders of all or any of said bonds, *on* the real estate of said corporation situated in the city of Youngstown, county of Mahoning and State of Ohio, consisting of about forty-five acres of land, with the two blast furnaces, six iron rolling mills, and other buildings, improvements, fixed machinery, and other fixtures thereon, and of all the interest of said Brown, Bonnell and Company in what is known as the Struthers Blast Furnace property, comprising about thirty-two acres in the township of Poland, in said county, and is further secured by a pledge in writing to said Dan. P. Eells and John Hay, trustees, upon the trust aforesaid of seven hundred and ninty-three shares, of no market value as far as is known to defendants, of the Mahoning Coal Company, a mining corporation of said State of Ohio; to copies of which mortgage and pledge hereto attached, marked Exhibits 11 and 12, respectively, and said mortgage copies made a part of this pleading, reference is hereby made for a particular description of the premises and property so included therein to secure the payment of said bonds—

The conveyance of said property being absolute except upon the performance of all the conditions in said mortgage contained, among which conditions was one that said Brown, Bonnell and Company

should pay, according to the tenor thereof, each and every one
65 of said bonds, with all the interest thereon as it became due.

And the aforesaid answering defendants aver that said condition has not been complied with; a large amount of interest having become due upon said bonds has not been paid according to the tenor thereof and the coupons thereto attached, amounting in all upon the bonds so held by these answering defendants to the sum of thirty-one thousand five hundred dollars, with interest from the time said coupons became due, amounting to $—.

And said answering defendants aver that said bonds so held by them have been certified as required by the terms of said mortgage and all of the conditions required to be performed by said trustees have in all respects been performed, while said Brown, Bonnell and Company have failed to perform the conditions hereinbefore specified, as well as other conditions of said mortgage on its part to be performed, and said deed has become absolute. Said mortgage was duly received for record by the recorder of said county of Mahoning, at this office, on the 17th day of Feb., 1883, at 2.35 o'clock p. m., and duly recorded Feb. 9, 1883, in Mahoning County, Ohio, Records of Mortgages, in volume 21, at page 265, and became and is a first lien on the property therein described.

Said Commercial National Bank holds thirty of the aforesaid bonds, numbered from 71 to 100, both inclusive.

Said Dan. P. Eells holds sixteen of the aforesaid bonds, numbered from 1 to 16, both inclusive.

Said Charles A. Otis holds sixteen of the aforesaid bonds, numbered from 33 to 44, both inclusive, and 61 to 64, inclusive.

Said William H. Harris holds sixteen of the aforesaid bonds, numbered from 17 to 32, both inclusive.

66 Said executors of the estate of Amasa Stone, deceased, hold sixteen of the aforesaid bonds, numbered from 45 to 60, both inclusive.

And said answering defendants further aver that the conditions upon which said bonds were pledged to them respectively have been broken, and said bonds or the proceeds thereof belong to said answering defendants, and they are entitled to the amount of interest now due and unpaid upon said bonds as applicable upon the claims so held against said Brown, Bonnell and Company as hereinbefore specified; and said defendants, Eells and Hay, trustees, aver that the facts hereinbefore set forth in this pleading are in all respects true, and they re-assert the same, and said answering defendants, together with said defendants, Eells and Hay, trustees, and all of said answering defendants, pray that in default of payment of the amount of interest now due or the amount of principal and interest that may become due before a final decree shall be taken herein that said mortgage may be foreclosed and said premises sold free of all claims of said Brown, Bonnell and Company and the proceeds thereof applied to the payment of the amounts so found due these answering defendants as they may be respectively entitled thereto.

And said answering defendants admit that, except as hereinbefore stated, the averments and allegations set forth in the original and

supplemental bills are true, and they re-assert the same in their own behalf; and they aver that since the commencement of this suit, as they are informed and believe and aver the facts so to be, that the president of said Brown, Bonnell and Company, Herbert C. Ayer, who has become insolvent and was insolvent prior to October 20th, 1883, and had not in any way acted for said company since his insolvency became known, which was some time in Feb. of said year, did on the 20th day of Oct., 1883, by an instrument of writing of that date, to which he signed the name of Brown, Bonnell and Company, by himself as president, appoint Henry Crawford, of Chicago, Illinois, general counsel of said Brown, Bonnell and Company, thereby authorizing and directing him to take full and exclusive charge of all litigation against or in favor of said corporation and to fully represent and appear for it in all legal proceedings and take care of its interest in all negotiations for arrangements or composition with its creditors or for reorganization, as will appear by a copy of said instrument of writing which is attached hereto and marked " Exhibit B," and to which reference is hereby made; all of which was done without any authority whatever from the board of directors or stockholders of said corporation and without their knowledge or consent, and for the purpose of giving preference to certain creditors of said corporation and to damage the rights and interests of others, and that said property might be taken from the hands of the receiver appointed by this court, whereby it might be endangered, wasted, and thereby the securities of these answering defendants greatly lessened.

67

And, pursuant to said fraudulent design in giving preference to certain of said creditors, the said Henry Crawford, so representing said Brown, Bonnell and Company, without the authority of its stockholders and board of directors, did, on or about the 23d day of November, A. D. 1883, appear before the court of common pleas of Mahoning county, in said State of O., and by his confession thirty-three judgments were entered against said corporation, amounting in the aggregate to the sum of five hundred and seventy thousand eight hundred and six dollars and sixty-nine cents, which judgments were so entered without the authority of said company, as hereinbefore stated. Wherefore these answering defendants, together with said Eells and Hay, trustees, also pray, for the reasons set forth in the original and supplemental bills and on account of the facts hereinbefore stated occurring since the filing thereof, that the receiver heretofore appointed by this court in this cause may be retained until the rights of all the parties therein shall be determined and the final decree shall — entered herein, and for such other and further relief as these answering defendants may be entitled to and as equity and good conscience may require.

68

JOEL W. TYLER & A. ST. J. NEWBURRY.
Solicitors for Defendants.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Dan. P. Eells, being first duly sworn, on oath says that he is one

of the defendants named in the foregoing answer and cross-bill; that he has read the same and is acquainted with the contents, and that the facts stated and the allegations contained therein are true, as he verily believes.

DAN. P. EELLS.

Subscribed in my presence and sworn to before me this 1st day of December, A. D. 1883.

[SEAL.] G. W. SHUMWAY,
Notary Public.

69 Copy.

$5,583.14. CHICAGO, *Sept.* 15, 1882.

On February 20, 1883, after date, we promise to pay to the order of Brown, Bonnell & Company fifty-five hundred and eighty-three ^{14} dollars at the Union National Bank, value received.

No. —. Due ——.

(Signed) JNO. V. AYER & SONS.

"Exhibit A."

Endorsed: Pay Jas. Colwell, cashier, or order. Brown, Bonnell & Company, by F. H. Mathews, treas. Paid by Brown, Bonnell and Company on this note, $778.80, Feb. 23, 1883. Protested for non-payment at Chicago, Ill., Feb. 23, 1883, by John B. Meyer, notary public. Certificate of protest attached to original note. Fees paid, $2.30.

Copy.

$5,511.74. CHICAGO, *Dec.* 30*th*, 1882.

On May 19th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. fifty-five hundred eleven ^{74} dollars at the Union National Bank, value received.

No. —. Due ——.

(Signed) JOHN V. AYER & SONS.

"Exhibit B."

Endorsed: Pay Jas. Colwell, cashier, or order. Brown, Bonnell & Co., by F. H. Mathews, tres.

Copy.

$5,546.72. CHICAGO, *Dec.* 30*th*, 1882.

On May 21st, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. fifty-five hundred forty-six ^{72} dollars at the Union National Bank, value received.

No. —. Due ——.

(Signed) JNO. V. AYER & SONS.

Exhibit C.

Endorsed: Pay Jas. Colwell, cashier, or order. Brown, Bonnell & Co., by F. H. Mathews, tres.

Copy.

$5,591.67. CHICAGO, *Dec. 30th*, 1882.

On May 22d, 1883, after date, we promise to pay to the order
70 of Brown, Bonnell & Co. fifty-five hundred ninety-one [67] dollars at the Union National Bank, value received.

No. —. Due ——.

(Signed) JOHN V. AYER & SONS.

Exhibit D.

Endorsed: Pay Jas. Colwell, cashier, or order. Brown, Bonnell & Company, by F. H. Mathews, tres.

Copy.

$5,636.19. CHICAGO, *December* 30, 1882.

On May 23, 1883, after date, we promise to pay to the order of Brown, Bonnell and Company fifty-six hundred thirty-six [19] dollars at the Union National Bank, value received.

No. —. Due ——.

(Signed) JOHN V. AYER & SONS.

Exhibit E.

Endorsed: Pay Jas. Colwell, cashier, or order. Brown, Bonnell and Company, by F. H. Mathews, tres.

Copy.

$5,673.29. CHICAGO, *Dec.* 30, 1882.

On May 25th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. fifty-six hundred and seventy-three dollars twenty-nine cents at the Union National Bank, value received.

No. —. Due ——.

(Signed) JNO. V. AYER'S SONS.

"Exhibit F."

Endorsed: Pay Jos. Colwell, cashier, or order. Brown, Bonnell & Co., by F. H. Mathews, treas.

Copy.

$5,791.11. CHICAGO, *Jan. 31st*, 1883.

On June 17th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. fifty-seven hundred ninety-one dollars and eleven cents at the Union National Bank, value received.

No. —. Due ——.

(Signed) J. V. AYER & SONS.

Exhibit G.

Endorsed: (Signed) Brown, Bonnell and Company, by F. H. Mathews, treas.

Copy.

$5,643.12. CHICAGO, *Jan.* 31*st*, 1883.

71 On June 18th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. fifty-six hundred forty-three dollars and twelve cents at the Union National Bank, value received.

No. —. Due ——.

(Signed) JNO. V. AYER & SONS.

"Exhibit H."

Endorsed: (Signed) Brown, Bonnell and Co., by F. H. Mathews, treas.

Copy.

$5,511.22. CHICAGO, *Jan.* 31*st*, 1883.

On June 19th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Company fifty-five hundred eleven dollars and twenty-two cents at the Union National Bank, value received.

No. —. Due ——.

(Signed) JNO. V. AYER & SONS.

"Exhibit I."

Endorsed: (Signed) Brown, Bonnell & Co., by F. H. Mathews, treas.

Copy.

$5,510.86. CHICAGO, *Jan.* 31*st*, 1883.

On June 28th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co., fifty-five hundred ten dollars and eighty-six cents at the Union National Bank, value rec'd.

No. —. Due ——.

(Signed) JNO. V. AYER & SONS.

"Exhibit J."

Endorsed: (Signed) Brown, Bonnell & Co., by F. H. Mathews treas.

Copy.

$4,880.38. CHICAGO, *Jan.* 31, 1883.

On June 22d, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. forty-eight hundred eighty dollars and thirty-eight cents at the Union National Bank, value received.

No. —. Due ——.

(Signed) JNO. V. AYER & SONS.

"Exhibit K."

Endorsed: (Signed) Brown, Bonnell & Co., by F. H. Mathews, treas.

Copy.

$8,333.33. YOUNGSTOWN, O., *Oct.* 19*th*, 1882.

On March 21st, 1883, after date, we promise to pay to the order of Dan. P. Eells eighty-three hundred thirty-three $\frac{33}{100}$ dols.
72 at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Treas.*

" Exhibit L."

Endorsed: Dan. P. Eells. Brown, Bonnell & Company, by F. H. Mathews, treas.

Copy.

$8,333.33. CLEVELAND, OHIO, *November* 18, 1888.

Four months after date we promise to pay to the order of Dan. P. Eells eighty-three hundred thirty-three dollars and thirty-three cents at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Treas.*

" Exhibit M."

Endorsed: Dan. P. Eells, per H. P. Eells. Brown, Bonnell & Co., by F. H. Mathews, treas.

Copy.

$6,250.00. YOUNGSTOWN, *December* 18*th*, 1882.

April 18th, after date, we promise to pay to the order of Dan. P. Eells sixty-two hundred and fifty dollars at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

" Exhibit N."

Endorsed: Dan. P. Eells, p'r H. P. Eells. Brown, Bonnell & Company, by F. H. Mathews, tr.

Copy.

$6,250.00. YOUNGSTOWN, *Dec.* 18*th*, 1882.

May 22, after date, we promise to pay to the order of Dan. P. Eells sixty-two hundred and fifty dollars at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & COMPANY,
By F. H. MATHEWS, *Tr.*

" Exhibit O."

Endorsed: Dan. P. Eells, p'r H. P. Eels. Pay Am. Exchange National Bank or order. Brown, Bonnell & Co., by F. H. Mathews, tr.

73 Copy.

$8,333.00. YOUNGSTOWN, *Dec.* 24*th*, 1883.

On April 23d, 1883, after date, we promise to pay to the order of Dan. P. Eells eighty-three hundred and thirty-three dollars at Commercial Nat. Bank, Cleveland, Ohio, value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

Copy. " Exhibit P."

Endorsed: Dan. P. Eells. Brown, Bonnell & Co., by H. C. Ayer, p't.

Copy.

$5,000.00. YOUNGSTOWN, O., *Dec.* 4, 1882.

On April 16th, 1883, after date, we promise to pay to the order of Chas. A. Otis five thousand dollars at Com'l Nat'l B'k, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

" Exhibit Q."

Endorsed: Copy. Chas. A. Otis. Brown, Bonnell & Co., by H. C. Ayer, p't. Pay G. A. Garretson, as C., or order, for collection only on account of Am. Exchange Nat'l Bank. G. Burns, A. ch. National Bank of Commerce. Paid Apr. 19, 1883. Cleveland, Ohio.

Copy.

$5,000.00. YOUNGSTOWN, OHIO, *Dec.* 4*th*, 1882.

On April 17th, 1883, after date, we promise to pay to the order of Chas. A. Otis five thousand dollars at Com'l Nat'l Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

" Exhibit R."

[Endorsed:] Chas. A. Otis. Brown, Bonnell & Co., by H. C. Ayer, p't. Pay G. A. Garretson or order, for collection only on account of Am. Exchange National Bank. E. Burns, A. C.

$5,000.00. YOUNGSTOWN, OHIO, *December* 4*th*, 1882.

On April 18th, 1883, after date, we promise to pay to the order of Chas. A. Otis five thousand dollars at Com'l Nat'l Bank, Cleveland, Ohio, value received.

74 No. —. Due. ——.

BROWN, BONNELL & COMPANY,
By F. H. MATHEWS, *Tr.*

" Exhibit S."

Endorsed: Copy. Chas. A. Otis. Pay Edward Townsend, cashier, or order. Jno. V. Ayer, pres. Pay J. F. Whitelaw, Esq., cashier, or order, for collection for account of the Importers' & Traders' National Bank of New York. National City Bank. Paid. Cleveland, O.

$10,000.00. YOUNGSTOWN, OHIO, *Dec.* 4, 1882.

On April 20th, 1883, after date, we promise to pay to the order of Chas. A. Otis ten thousand dollars at Com'l Nat'l Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit T."

Endorsed: Copy. Chas. A. Otis. Pay Edward Townsend, cashier, or order. Jno. V. Ayer, pres. Pay J. F. Whitelaw, Esq., cashier, or order, for collection for account of the Importers' & Traders' National Bank of New York. National City Bank, Cleveland, Ohio, Paid.

$5,000.00. YOUNGSTOWN, OHIO, *Dec. 4th*, 1882.

On May 15th, 1883, after date, we promise to pay to the order of Chas. A. Otis five thousand dollars at Com'l Nat'l B'k, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit U."

Endorsed: Copy. Chas. A. Otis. Pay Edward Townsend, cashier, or order. Jno. V. Ayer, pres. Pay J. F. Whitelaw, Esq., cashier, or order, for collection for account of the Importers' & Traders' National Bank of New York. National City Bank, Cleveland, Ohio. Paid.

$5,000.00. YOUNGSTOWN, O., *Dec. 4th*, 1882.

75 On May 16th, 1883, after date, we promise to pay to the order of Chas. A. Otis five thousand dollars at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.
F. H. MATHEWS, *Tr.*

"Exhibit V."

Endorsed: Copy. Chas. A. Oties. Pay Edward Townsend, cashier, or order. Jno. V. Ayer, pres. Pay J. F. Whitelaw, Esq., cashier, or order, for collection for account of the Importers' & Traders' National Bank of New York. Paid. National City Bank, Cleveland, Ohio.

$5,000.00. YOUNGSTOWN, O., *Dec. 4th*, 1882.

On May 18, 1883, after date, we promise to pay to the order of Chas. A. Otis five thousand dollars at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit W."

Endorsed: Copy. Chas. A. Otis. Pay Edward Townsend, cashier, or order. Jno. V. Ayer, pres. Pay J. F. Whitelaw, Esq., cashier, or order, for collection for account of the Importers' & Traders' National Bank of New York. Paid. National City Bank, Cleveland, Ohio.

$10,000.00. YOUNGSTOWN, OHIO, *Dec. 4th*, 1882.

On May 19th, 1883, after date, we promise to pay to the order of Chas. A. Otis ten thousand dollars at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

" Exhibit X."

Endorsed: Copy. Chas. A. Otis. Pay Edward Townsend, cashier, or order. Jno. V. Ayer, pres. Pay J. F. Whitelaw, Esq., cashier, or order, for collection for account the Importers' & Traders' National Bank of New York. Nat'l C. B'k. Paid. Cleve., O.

76 $8,333.34. YOUNGSTOWN, O., *Oct. 19th*, 1882.

On March 23rd, 1883, after date, we promise to pay to the order of W. H. Harris eighty-three hundred thirty-three dollars and thirty-four cents at Commercial National Bank, Cleveland, O., value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

Copy. " Exhibit 1."

Endorsed: W. H. Harris.

$8,333.34. CLEVELAND, OHIO, *Nov.* 18, 1882.

Four months after date we promise to pay to the order of W. H. Harris eighty-three hundred thirty-three dollars and thirty-four cents at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & COMPANY,
By F. H. MATHEWS, *Tr.*

Copy. " Exhibit 2."

Endorsed: W. H. Harris. Brown, Bonnell & Co., by F. H. Mathews, tr. Pay Commercial National Bank, Cleveland, Ohio, or order, for collection on account of Wick Brothers & Co., Youngstown, Ohio.

$8,333.00. YOUNGSTOWN, OHIO, *Dec.* 4, 1882.

On April 24th, 1883, after date, we promise to pay to the order of W. H. Harris eighty-three hundred thirty-three dollars at Commercial National Bank, Cleveland, Ohio, value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

Copy. " Exhibit 3."

Endorsed: W. H. Harris. Brown, Bonnell & Co., by H. C. Ayer, p't. Pay Geo. A. Garretson or order, for collection only on account of Am. Exchg. National Bank. E. Burns, A. cash'r. National Bank of Commerce. Paid April 27th, 1883.

77 $6,250.00. YOUNGSTOWN, OHIO, *Dec.* 18*th*, 1882.

April 24th, after date, we promise to pay to the order of W. H. Harris sixty-two hundred and fifty dollars at Commercial National Bank, Cleveland, O., value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

Copy. "Exhibit 4."

Endorsed: W. H. Harris. Pay Am. Exchange Nat. B'k or order. Brown, Bonnell & Co., by F. H. Mathews, tr. Pay G. A. Garretson or order, for collection only on account of Am. Exchange Nat'l Bank. E. Burns, A. cash'r. National Bank of Commerce. Paid April 27th, 1883.

$6,250.00. YOUNGSTOWN, O., *Dec.* 18, 1882.

May 23rd, after date, we promise to pay to the order of W. H. Harris sixty-two hundred and fifty dollars at Commercial National Bank, Cleveland, O., value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit 5." Copy.

Endorsed: W. H. Harris. Pay Am. Exch'ge National Bank or order. Brown, Bonnell & Co., by F. H. Mathews, tr. Pay G. A. Garretson or order, for collection only on account of Am. Exchange National Bank. D. Park, cash'r. National B'k of Commerce. Paid May 23d, 1883.

$8,333.33. YOUNGSTOWN, O., *Nov.* 18, 1882.

Four months after date we promise to pay to the order of Amasa Stone eighty-three hundred thirty-three dollars and thirty-three cents at Commercial National Bank, Cleveland, O., value received.

No. —. Due ——. BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit 6."

Endorsed: Amasa Stone. Pay Am. Ex. Nat. Bank or order. Brown, Bonnell and Company, by F. H. Mathews, tr.

78 $8,333.00. YOUNGSTOWN, O., *Dec.* 4, 1882.

On April 21st, 1883, after date, we promise to pay to the

order of Amasa Stone eighty-three hundred and thirty-three dollars at Commercial National Bank, Cleveland, Ohio, value received.
No. —. Due ——.

BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit 7."

Endorsed: A. Stone. Brown, Bonnell & Co., by H. C. Ayer, p't.

$6,250.00. YOUNGSTOWN, O., *Dec.* 18*th*, 1882.

April 17th, after date, we promise to pay to the order of Amasa Stone sixty-two hundred and fifty dollars at Commercial National Bank, Cleveland, Ohio, value received.
No. —. Due ——.

BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit 8."

Endorsed: A. Stone. Pay Am. Ex. National Bank or order. Brown, Bonnell & Company, by F. H. Mathews, tr.

$6,250.00. YOUNGSTOWN, O., *Dec.* 18*th*, 1882.

May 16th, after date, we promise to pay to the order of Amasa Stone sixty-two hundred and fifty dollars at Commercial National Bank, Cleveland, Ohio, value received.
No. —. Due ——.

BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit 9."

Endorsed: A. Stone. Pay Am. Ex. Nat. Bank or order. Brown, Bonnell & Co., by F. H. Mathews, tr.

$8,333.33. YOUNGSTOWN, O., *Oct.* 19*th*, 1882.

On March 19th, 1883, after date, we promise to pay to the order of Amasa Stone eighty-three hundred thirty-three dollars and thirty-three cents at Commercial National Bank, Cleveland, O., value received.
No. —. Due ——.

BROWN, BONNELL & CO.,
By F. H. MATHEWS, *Tr.*

"Exhibit 10."

79 Endorsed: Pay to the order of N. T. Sanford, ag't. Amasa Stone. Mahoning Coke Co., Limited, by N. T. Sanford, ag't.

NEW YORK, *Oct.* 20*th*, 1883.

Henry Crawford, of Chicago, Ill., is hereby appointed general counsel of Brown, Bonnell & Company, and as such is authorized and directed to take full and exclusive charge of all litigation against or in favor of said corporation and to fully represent and appear for

it in all legal proceedings and take care of its interests in all negotiations for arrangements or composition with its creditors or for reorganization.

BROWN, BONNELL & COMPANY,
By H. C. AYER, *President.*

"Exhibit Z."

"EXHIBIT 11."

This indenture, made this third day of April, A. D. one thousand eight hundred and eighty two, by and between Brown, Bonnell & Co., a corporation organized and existing under the laws of the State of Ohio, party of the first part, and Dan. P. Eells and John Hay, of the city of Cleveland, Ohio, parties of the second part, witnesseth:

That whereas the party of the first part, being thereto empowered by law, has, by due action taken, resolved to borrow money, in the aggregate five hundred thousand dollars, and to issue therefor its bonds bearing even date herewith, one hundred in number, in the denomination of five thousand dollars each, all of like tenor except as to the time of their maturity, of which bonds six are payable in two years, seven in three years, eight in four years, nine in five years, ten in six years, twelve in seven years, fourteen in eight
80 years, sixteen in nine years, and eighteen in ten years from the date hereof, the bonds to be duly executed under the seal of the party of the first part by the president and treasurer thereof, and the interest coupons to be authenticated by the lithographed fac-simile of the signature of said treasurer, and the bonds also to bear the certificate of the parties of the second part, each of which bonds, with the coupons attached, shall, except as to the time of maturity, be of the tenor and effect following—that is to say:

UNITED STATES OF AMERICA, *State of Ohio.*

$5,000.00.

Brown, Bonnell and Company, a corporation organized and existing under the laws of Ohio, acknowledges itself indebted unto Dan. P. Eells and John Hay or bearer in the sum of five thousand dollars, and promises to pay the same on the third day of April, A. D. one thousand eight hundred and (18—) at the Commercial National Bank, in the city of Cleveland, Ohio, and to pay interest thereon from and after the third day of April, 1882, at the rate of six per centum per annum semi-annually on the third days of October and April in each year, at said bank, upon presentation and surrender of the interest warrants hereto attached as they respectively become payable. This bond is one of a series of one hundred bonds numbered consecutively from number one to number one hundred, inclusive, all of like date and amount and of the same tenor, except as to the time of their maturity, of which series six bonds numbered consecutively from number one to number six, inclusive, are payable on the 3rd day of April, 1884; seven bonds numbered consecutively from number seven to number thirteen, inclusive, are

payable on the 3rd day of April, 1885; eight bonds numbered
81 consecutively from number fourteen to number twenty-one, inclusive, are payable on the 3rd day of April, 1886; nine bonds numbered consecutively from number twenty-two to number thirty, inclusive, are payable on the 3rd day of April, 1887; ten bonds numbered consecutively from number thirty-one to number *fifty*, inclusive, are payable on the 3rd day of April, 1888; twelve bonds numbered consecutively from *fifty*-one to number fifty-two, inclusive, are payable on the 3rd day of April, 1889; fourteen bonds numbered consecutively from number fifty-three to number sixty-six, inclusive, are payable on the 3rd day of April, 1890; sixteen bonds numbered consecutively from number sixty-seven to number eighty-two, inclusive, are payable on the 3rd day of April, 1891, and eighteen bonds numbered consecutively from number eighty-three to number one hundred, inclusive, are payable on the 3rd day of April, 1892. The payment of the principal and interest of all of said bonds is secured by a deed in the nature of a mortgage, bearing even date herewith, made by said corporation to said Dan. P. Eells and John Hay, trustees, conveying to them in trust for the security of the successive holders of all of said bonds all the real estate of said corporation situate in the city of Youngstown, county of Mahoning and State of Ohio, consisting of about forty-five acres of land, with the two blast furnaces, six iron rolling mills, and other buildings, improvements, fixed machinery, and with other fixtures thereon, and of all the interest of said corporation in what is known as the Struthers Blast Furnace property, comprising about 32 acres in the township of Poland in said county, and is further secured by a pledge in writing to said Dan. P. Eells and
82 John Hay upon the trust aforesaid of 793 shares of the capital stock of the Mahoning Coal Company, a mining corporation of the said State of Ohio, to which mortgage and pledge reference is hereby made, and upon the certificate of said trustees, hereon endorsed, this bond will become secured by the said mortgage and by said pledge of shares.

In testimony whereof the said corporation, Brown, Bonnell & Co., has caused its corporate seal to be hereto affixed and this bond to be subscribed by its president and treasurer and the accompanying interest warrants to be authenticated by the lithographed fac-simile of the signature of said treasurer on this third day of April, A. D. 1882.

[SEAL.] —— ——, *Treasurer.* —— ——, *President.*

(*Trustees' Certificate.*)

We hereby certify that the within bond is issued under and by virtue of the deed in the nature of a mortgage therein named, and that the payment of the principal and interest of said bond is secured by said mortgage and by the pledge of shares therein named.

(*Coupon.*)

$150.00.

On the third day of Oct., 1882, Brown, Bonnel and Company will pay to the bearer, at the Commercial National Bank, in the city of Cleveland, Ohio, one hundred and fifty dollars, being the semi-annual interest that day due on its bond No. —.

F. H. MATHEWS, *Treas.*

And whereas for the purpose of securing the payment of said bonds and the interest thereon the party of the first part is authorized and has by due action taken determined to make this deed in the nature of a mortgage, and directed its president and secretary to execute and deliver said deed to the parties of the second part as trustees:

83 Now, therefore, in order to secure the payment of said bonds and the interest coupons thereto attached and the performance on its part of its covenants in this indenture contained, and in consideration of one dollar to it paid by the parties of the second part, the receipt whereof is hereby acknowledged, the party of the first part does hereby grant, bargain, sell, convey, and confirm unto the parties of the second part and the survivors of them, unto his heirs and assignees forever, all of the following twenty-nine parcels of land situate in the city of Youngstown, county of Mahoning and State of O., and all and singular the two blast furnaces, the six rolling mills, and all the other buildings, structures, improvements, fixed machinery, and other fixtures thereon, of which parcels of land the 1st parcel is part of the lot No. 10, in the east division of out-lots in the original town plat of Youngstown, and is bounded as follows: Beginning at a post on the east line of the highway to Gibson's Fording and 15 feet from common water-mark in the Pennsylvania and Ohio canal, running thence south on the east line of said road 16 rods; thence east 10 rods; thence north 16 rods; thence west on the bank of said canal 15 feet from the common water-mark 10 rods to the place of beginning, containing one acre of land. The 2nd parcel is also a part of said out-lot 10 and is bounded as follows: Beginning at the northeast corner of the 1st parcel 15 feet from the top water-line of the said canal, running thence south 18 rods and 23 links to the Mahoning river; thence eastwardly on the north bank of said river 18 rods and 12 links to a post near the outlet of a ditch; thence north parallel with the east line of the 1st parcel 16 rods and 21 links to the bank of said canal, and thence on the bank of said canal

84 N. 86½° W. 18 rods to the place of beginning, containing about two acres and 17 perches. The 3rd parcel is bounded as follows: Beginning at the low-water mark on the north bank of the Mahoning river and on the east line of the 2nd parcel, on which stands the Falcon furnace, running thence north on said east line of the 2nd parcel to a stake 15 feet from the water in said canal; thence eastwardly along the bank of said canal, keeping 15 feet from the water therein, to a point such that if a line were drawn from it southerly parallel with the first-named boundary line of this parcel

so as to meet a line drawn eastwardly along the bank of said river from the place of beginning there would be contained within said four boundary lines one acre of ground, and said parcel has for its boundary lines the said four described lines. The 4th parcel is known as part of lot No. 1, in the original survey of the south division of out-lots in the town plat of Youngstown, and is bounded on the northerly side by the outer line of the towing path of said canal, on the easterly side by the highway or street leading to the Mahoning bridge, on the southerly side by the Mahoning river, and on the westerly side by the west line of said lot No. 1, which is also the east line of lands formerly owned by the late William Rayen, deceased. The 5th parcel is bounded as follows: Beginning on the northwest corner of a lot known as the Phœnix Furnace lot and at a point 15 feet south of the common water-mark in said canal, thence running S. 29¼ degrees W. 8 chains and 35 links to low-water mark on the north bank of the Mahoning river; thence N. 82¾ degrees W. 6 chains 7½ links; thence N. 29¼ degrees E. 85 3 chains 30 and one-third links; thence N. 60 and three-fourths degrees W. 1 chain 89½ links; thence N. 29¼ degrees E. 5 chains and 30 links to an iron stake 15 feet south of top water-line of said canal; thence S. 73 degrees E. 1 chain 72 links; thence S. 76 and three-fourths degrees E. 6 chains 4 links to the place of beginning, containing about 5.924 acres. The 6th parcel is bounded and described as follows: Beginning at a point on the north line of the right of way and lands formerly belonging to the Pennsylvania and Ohio Canal Company, where said line is met by the west line of the east half of lot No. 33 of Bone and Wick's subdivision of a part of the south division of out-lot in the town plat of Youngstown, thence running northerly along said west line to the south line of the north half of said lot No. 33; thence westerly along said south line and parallel with Bane street to the west line of said lot 33; thence northerly along said west line of said lot 30 feet; thence easterly parallel with Bane street to the west line of the east half of said lot; thence northerly along said west line of said east half of said lot 12 feet; thence easterly parallel with Bane street to the east line of said lot 33; thence northerly along said east line of said lot to the south line of Bane street; thence easterly along the south line of Bane street to a point where said south line of Bane street would be met by the production southerly of the east line of Walnut street; thence northerly along the southerly production of said east line and along the east line of Walnut street to the northwest corner of lot No. 21 of said Bane and Wick's subdivision; thence easterly parallel with Bane street to the northwest corner of lot No. 16 of Bane & Wick's said subdivision; thence easterly along the south line of an alley to the west line of 86 Presq. Isle street; thence southerly along said west line last named to the north line of the right of way and lands formerly belonging to the said canal company, and thence westerly along said north line of the right of way and lands last named to the place of beginning. The 7th parcel is a part of lot No. 252 of the latest numbering of lots in said city, and is bounded as follows: Beginning at

the southeast corner of said lot, thence northerly along the east line thereof 18 feet; thence by a southwesterly course to a point on the south line of said lot distant westerly 45½ feet from the southeast corner of said lot; thence easterly along the south line of said lot 45½ feet to the place of beginning. The 8th parcel is bounded as follows: Beginning at a point on the east line of Presq. Isle street S. 2½ degrees W. 26 links from the southwest corner of a lot conveyed to Brown, Bonnell & Co. by C. H. Andrews *et al.* by a deed which is recorded in the records of said county, in volume 20, at page 84 *et seq.*, thence running S. 2½ degrees W. along said east line of said street 20 feet; thence S. 81½ degrees E. 1 chain and 52 links; thence north 4 degrees E. 20 feet; thence N. 81½ degrees W. 1 chain and 53 links to the place of beginning. The 9th parcel is that part of lot 33 which was conveyed to Andrews & Hichcock 2nd July, 1860, by David Tod, and is bounded as follows: Beginning at a stake on the line between said lot and lot 32, 1 chain 68 links S. 29½ degrees W. from the south line of Front street, thence running S. 29½ degrees W. 95 links to the canal; thence up said canal 49 links; thence N. 4 degrees E. 1 chain 50 links; thence S. 82¼ degrees E.
31 links; thence S. 87 and three-fourth degrees E. 58 links
87 to the place of beginning. The 10th parcel is that part of outlot No. 32 of the southeast division of out-lots in the former village of Youngstown, which on the 12th Sept., 1859, was conveyed by J. Warner to Andrews & Hitchcock, and is bounded as follows: Beginning at a stake where the west line of said lot 32 meets the berme bank of said canal, running thence N. 29½ degrees E. 95 links; thence S. 85 degrees E. 1 chain 23 links; thence S. 28½ degrees W. 80 links; thence S. 89 degrees W. 1 chain 30 links to the place of beginning. The 11th parcel is the south part of city lot No. 281 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presq. Isle street S. 2½ degrees W. 2 chains 78¼ links from the southeast corner of Front and Presq. Isle streets, thence running along the east line of Presq. Isle street S. 2½ degrees W. 26 links; thence S. 79 and three-fourths degrees E. 1 chain 53 links; thence north 4 degrees E. 21 links; thence N. 77 degrees W. 1 chain 55 links to the place of beginning. The 12 parcel is known as city lot No. 280 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presq. Isle street S. 2½ degrees W. 20 feet from the southwest corner of said lot No. 281, thence running along the east line of said street S. 2½ degrees W. 65½ links to said canal; thence along the north side of high water in said canal S. 83½ degrees E. 1 chain 50 links; thence N. 4 degrees E. 52½ links; thence N. 79 and two-thirds degrees W. 1 chain 52 links to the place of beginning. The 13th parcel is all the land which was conveyed on Dec. 5th, 1883, by William Lindsay *et ux.* to the firm of Brown, Bonnell & Company by a deed which is recorded in vol. 38, at page 233 *et seq.*,
88 which deed is here referred to. The 14th parcel is all the land ever owned or occupied by the Pennsylvania and Ohio Canal Co., which lies between the centre of Crab creek on the east and on the east side of what is known as Rany's mill on the west, including

between said east and west boundaries all of the land ever occupied by berme bank, water channel, and towing-path of said canal. The 15th parcel comprises all the land conveyed to the firm of Brown, Bonnel & Co. by Henry Manning on Nov. 26th, 1883, by a deed recorded in said records in vol. 19, at page 711, except such part of said lands as lies in the 14th parcel, and including all such rights as were conveyed by said Henry Manning in his said deed, which is here referred to. The 15 parcels above named *was* conveyed on the 9th day of Oct., 1875, by Joseph H. Brown *et al.* to the party of the first part by a deed which is recorded in the records of said county in vol. 38, at page 606 *et seq.*, and is here referred to. The 16th parcel is the west half of the south half of lot No. 33, in Bane and Wick's said subdivision, and also all of lot No. 32, in said subdivision, except such part of said lot 32 as was sold by Almon Raney and wife and Bostwick Raney to Ellen Farrall, and except also such part of said lot 32 as was conveyed by said Almon Raney, wife, and Bostwick Raney to Ann McGraw by a deed which is recorded in the records of said county in vol. 19, at page 493. Said 16th parcel was conveyed to said corporation 9th October, 1879, by H. O. Bonnell *et ux.* by a deed recorded in said records. in vol. 45, at page 352. The 17th parcel is the north half of the west half of the lot No. 33 of said Bane and Wick's subdivision, excepting so much thereof as was conveyed away by Geo. A. Young prior
89 to March 24th, 1880. The part above conveyed of said north half was conveyed to said corporation by A. E. Jones *et ux.* 24th April, 1880, by a deed recorded in said records in vol. 47, at page 384, and this 17th parcel shall contain as a part thereof all the interest conveyed by said Jones in said deed to said corporation in any other part of said lot 33 of said subdivision. The 18th parcel contains all the part of lot 275 of the latest enumeration in said city, which was conveyed to said corporation by Mary Degen *et al.* 24th Nov., 1880, by a deed which is recorded in said records in vol. 48, at page 98. The 19th parcel is city lot No. 574 of the latest enumeration in said city, and was conveyed to said corporation 3rd January, 1881, by John Regney *et ux.* by deed recorded in records of said county in vol. 45, at page 583. The 20th parcel is lot No. 572 of the latest enumeration in said city, and was conveyed 8th February, 1881, to said corporation by Bryan Kennedy *et al.* by a deed recorded in vol. 49, at page 14. The 21st parcel is lot No. 571 of the latest enumeration in said city, and was conveyed 22nd Feb., 1881, to said corporation by E. M. Willson, administrator of Patrick Corrigan, by a deed recorded in the said records in vol. 48, at page 291. The 22nd parcel is the east half of lot No. 580 of the latest enumeration in said city, and was conveyed to said corporation 19th March, 1881, by Christian Ludt *et al.* by a deed recorded in said records in vol. 49, at page 93. The 23rd parcel is the northwest part of original lot No. 11, as shown by plat of village lots of Youngstown made by Dr. Henry Manning and recorded in Mahoning County Records of Plats, vol. 1, page 51, bounded as follows: Be-

ginning at the northwest corner of said lot No. 11, thence
90 N. 74½ degrees E. 1 chain to lot owned by M. Fee and now known as city lot No. 582, new numbers; thence south 2 chains 71½ links; thence west 98 links to east line of original lot No. 12; thence N. ½ degree E. 2 chains 44½ links to the place of beginning, containing about one-fourth of an acre of land, and was conveyed 1st July, 1881, to said corporation by Thomas George *et ux.* by a deed recorded in said records in vol. 49, at page 392. The 24th parcel is the west half of lot 580 of the latest enumeration in said city, and is the same land which was conveyed to said corporation 1st July, 1881, by Catherine Scanlon *et al.* by a deed recorded in said records in vol. 49, at page 592. The 25th parcel is part of a larger parcel of ground conveyed to John Stambough, trustee, by W. S. Parmelee, trustee, 31st July, 1871, by a deed recorded in said records in Deed Book 31, at page 273, *et seq.*, and is bounded and described as follows: Beginning on the east line of said larger parcel at the middle of a stone monument standing in the northwest corner of a piece of ground conveyed by the Liberty and Vienna Railroad Company to the Ashtabula, Youngstown and Pitts. Railroad Company by a deed dated 25th August, 1871, and recorded in said records in vol. 33, at page 463 *et seq.*, thence running along the east line of said larger parcel conveyed as aforesaid by W. O. Parmelee, trustee, N. 30 degrees and 28 minutes E. about 398 & seven-tenths feet to a stone monument at a point 15 feet southerly from the line of high-water mark on the south side of the Pennsylvania and Ohio canal; thence along a line parallel with and distant 15 feet southerly from the said line of high-water mark on the south
91 side of said canal N. 49 degrees 44 minutes W. about 135 and three-fourths feet to a point which, measured along a line perpendicular to the east line of Market street, is distant easterly 150 feet from the east line of Market street; thence along a line parallel with and distant 150 feet easterly from the east line of Market street S. 31 degrees and 20 minutes W. about 421 and two-tenths feet to the north line of said ground conveyed as aforesaid to the Ashtabula, Youngstown and Pittsburgh Railroad Co., and thence along the said north line of land conveyed to said railroad company S. 59° 2 minutes E. about 137 and seven-tenths feet to the beginning, containing 1 acre and $\frac{28388}{100000}$ of an acre of land, and is the same land conveyed to said corporation by John Stambough, trustee, *et al.* 14th July, 1881, by a deed recorded in said records in vol. 50, at page 66 *et seq.* The 26th parcel is the east end of out-lot No. 2, in said city, contains about 3 & $\frac{2}{1000}$ of an acre of land, and is the same land conveyed to said corporation 30th July, 1881, by Edwin Bell *et al.* by a deed recorded in said records in vol. 50, at page 63 *et seq.*, which deed is here referred to for a more particular description of said last-named parcel. The 27th parcel is lot No. 576 of the latest enumeration in said city, and was conveyed to said corporation 16th November, 1881, by Mary Kelley by a deed recorded in said records in vol. 51, at page 34. The 28th parcel is the east part of lot No. 575 of the latest enumeration in said city, and bounded as follows: Beginning at the northwest corner of lot No.

574, on the south line of the Pennsylvania and Ohio canal, thence in a westerly course parallel with the south line of said lot No. 575 25 feet; thence south with the west line of lot No. 574 to the north line of lot No. 573; thence east along the north line of said
92 lot 573 25 feet to the southwest corner of said lot No. 574, and thence north along the west line of lot No. 574 to the place of beginning, and was conveyed to said corporation 25th November, 1881, by May Joice *et al.* by a deed recorded in said records, in vol. 51, at page 63. The 29th parcel is the west part of lot No. 575 of the latest enumeration in said city, situated on the south side of the Pennsylvania and Ohio canal, bounded on the north by the towing-path of said canal; on the east by the east part of said lot No. 575, which said east part was conveyed by Charles Gillen to Mary Kelly; on the south by lots 573 and 577, and on the west by lot No. 576, and was conveyed to said corporation 2nd December, 1881, by Michael Conners *et ux.* by a deed recorded in said records, in vol. 51, at page 90. Also all the right, title, and interest of the party of the first part in and to that lot of land on the northeast corner of Bane and Champion streets, in said city of Youngstown, on which stands the new brick office recently erected by it; also all the other lands and rights in land in the said city of Youngstown owned by said party of the first part as a part of its iron manufacturing works therein, saving the reservations and exceptions hereinafter written; also all the right, title, and interest of the party of the first part in and to those two certain parcels of ground in the township of Poland, in said county, one of about 29.49 acres and one of about 2.3 acres, known as the Struthers Furnace property, lately purchased by contract by the party of the first part from Thomas Struthers *et al.* and now in its possession, and in blast furnace and all buildings, structures, fixed machinery, and other fixtures thereon, saving and reserving, nevertheless, out of
93 and from the above conveyance all that part of the 29 parcels first above named which was conveyed by the party of the first part to the N. Y., P. & O. Railroad Company as a right of way for its railroad, and all that part of the residue of said 29 parcels which lies north of the land so conveyed to said railroad company, and also reserving and excepting all the rights in and all parts of all the said first-named 29 parcels of land which were reserved and excepted to the respective grantors in all of the deeds to the party of the first part above named, and this conveyance is made subject to the stipulations in all of said deeds contained:

To have and to hold all and singular the premises aforesaid, but subject to the reservations above named, unto the said parties of the second part as joint tenants and not as tenants in common, and to the survivor of them, and to his heirs and assigns forever, but nevertheless in trust to secure the payment according to the tenor, and to the successive holders and owners thereof, of each said bonds and of each of said interest coupons thereto attached, and upon the further trusts and conditions following and subject to the powers and conditions hereinafter named; and it is expressly covenanted and agreed between the parties to this indenture as follows—that is to say:

First. That the said bonds shall be certified by the parties of the second part according to the form of certificate above named, and until so certified shall not become secured hereby; that until default shall be made by the party of the first part in the payment pursuant to the terms thereof of the principal or interest of any of said bonds, and so long as the party of the first part shall well and
94 truly perform all its covenants contained in said bonds and in this indenture, it shall remain in the quiet and peaceable possession, use, enjoyment, and control of all the property herein conveyed, and if it shall well and truly pay according to the tenor thereof each and every one of said bonds with all the interest thereon, and if it shall also at all times keep and perform all its other covenants and agreements herein contained, or if in case of any default by it in the performance of any of its said other covenants and agreements it shall, within thirty days after receiving notice thereof, either from the parties of the second part or their survivors or their successors in the trust, fully repair such default, then this indenture and all the right, title, and estate hereinbefore conveyed shall become and remain void and of no effect.

Second. That so soon as the party of the first part shall, in accordance with the terms of its said contract with said Struthers and others, become seized with the legal title of said Struthers Furnace property, it will, upon request of the parties of the second part or the survivors, convey the same to them upon the same trusts herein contained.

Third. That the party of the first part will, so long as any of said bonds or the interest thereon may be outstanding and unpaid, keep all of said conveyed property in good and reasonable repair and condition, will cause all taxes thereon to be promptly paid, and will neither do nor suffer to be done any act whereby the lien hereby created shall be impaired, subject, however, to its right hereinbefore reserved to use and employ said property in the ordinary manner; and it further hereby agrees to pay all of said bonds and the interest warrants attached according to their true tenor.

95 Fourth. That while any of said bonds or interest remains unpaid the party of the first part will keep insured in good and responsible companies against loss or damage by fire all such of the inflammable part of the property hereby conveyed as shall be reasonably insurable in the aggregate sum not less than two hundred thousand dollars, if so much insurance can be obtained, such insurance to be made and kept payable to the parties of the second part as trustees herein, but the money received by the trustees in case of loss or damage by fire on account of such insurance shall, upon the request of the parties of the first part, be applied by the parties of the second part to the repairing, replacing, or rebuilding, under the joint direction and control of both parties, the property so damaged or destroyed.

Fifth. That the lien hereby created shall not in anywise be lessened or impaired by reason of the additional security for the payment of said bonds as named in the said bonds.

Sixth. That in case of a foreclosure of the lien hereby created the

avails of the property sold, first deducting costs and a reasonable compensation to be paid to the parties of the second part herein, shall be applied to the payment of all said bonds *there* remaining outstanding and unpaid, without preference to any because of difference in the time of maturity, but in such case all of the matured interest coupons on all outstanding bonds shall be paid before payment of any part of the principal.

Seventh. That the party of the first part further covenants and agrees that it has hitherto never executed any mortgage or
96 other conveyance creating any lien encumbrance on any of the above-conveyed lands.

In testimony whereof the party of the first part has caused its corporate seal to be hereto affixed and these presents to be subscribed by its president and secretary, and the parties of the second part, in token of their acceptance of the trusts hereby created, have hereunto set their hands and seals on the day first above written.

HERBERT C. AYER, *President.*
A. W. JONES, *Secretary.*
[SEAL.] BROWN, BONNELL & CO.

Signed, sealed, acknowledged, and delivered in presence of—
F. H. MATHEWS,
S. B. GOODALE,
As to H. C. Ayer.
SIDNEY STRONG,
WILLIAM R. NURDICH,
As to A. W. Jones.

THE STATE OF NEW YORK, }
County of New York, City of New York, } *ss:*

Before me, a commissioner of deeds for the State of Ohio, residing in said city and county, duly commissioned, personally came Herbert C. Ayer, president of the corporation — Brown, Bonnell & Company, and acknowledged that as president of said corporation he subscribed the foregoing indenture, and that his execution thereof and the affixing of the common seal of the corporation thereto was done by direction of a resolution of the board of directors, and that the foregoing indenture was his free act and deed as such president and the free act and deed of the said corporation.

97 Witness my hand and official seal on this 16th day of June, anno Domini 1882.

[SEAL.] S. R. GOODALE,
Commissioner for Ohio, Resident in N. Y. City.

THE STATE OF OHIO, }
Mahoning County, } *ss:*

Before me, a notary public within and for said county, personally came A. W. Jones, secretary of the corporation Brown, Bonnell & Company, and acknowledged that as such officer he subscribed his name to the foregoing indenture and affixed thereto the common

seal of said corporation, and that the same was his free act and deed as such officer and the free act and deed of said corporation; and, being sworn, he says that what purports to be the common seal of the said corporation, hereto affixed, is the genuine corporate seal thereof and was affixed to said indenture by him by order of the board of directors of said corporation.

Witness my hand and seal notarial on this 14th day of June, anno Domini 1882.

[SEAL.] WILLIAM R. MERRICH,
Notary Public.

98 And afterwards, to wit, on Monday, Dec. 24th, 1883, the following order was entered in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } 4195, Chancery.

In this cause the motion of the complainants to strike from the files the demurrer filed herein by Ralph J. Wick, and also the motion filed herein by Frank H. Mathews, John J. Williams, Frank B. Williams, and A. W. Jones, came on to be heard; whereupon, upon consideration, the court orders that the same be granted, and that the said demurrer and the said motion be stricken from the files of this court and not regarded in this cause.

99 And afterwards, to wit, on Monday, Dec. 24th, 1883, the following order was entered in this cause, and which is in words and figures following to wit:

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } 4195, Chancery.

In this cause, upon the appearance of J. W. Tyler and A. St. J. Newburry, as solicitors for the Commercial National Bank, Dan. P. Eells, Charles A. Otis, and William H. Harris, all defendants in this cause, upon request made, leave is granted to said named defendants to file their answer to the original and supplemental bill heretofore filed herein, the same to be filed as of the date of December eighteenth, A. D. 1883.

100 And afterwards, to wit, on the 28th of Jan., 1884, the following replication was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the answer of the Commercial National Bank, Charles A. Otis, William H. Harris, Dan. P. Eells, and John Hay, and John Hay and Samuel Mather, executors of the estate of Amasa Stone, deceased, and Dan. P. Eells and John Hay, trustees, not only in their own behalf but also in behalf of all other creditors of the defendant, Brown, Bonnell & Company, for replication thereto say that they will aver and prove their said bill and said supplemental bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by the repliants, without this, that any other matter or thing whatsoever in this said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their original and supplemental bills they have already prayed.

FRANCIS J. WING,
Solicitor for Complainants.

101 And afterwards, to wit, on the 14th day of Feb., 1884, the following motion was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States of America, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY.

The defendants now come and move the court to strike from the files the pretended answer and cross-bill of Commercial National Bank, Dan. P. Eells, and others, and for cause say:

1st. The court has no jurisdiction of the matters set up, as both the mortgagee and mortgagor are citizens of the State of Ohio.

2nd. Because no affirmative relief can be granted upon answer.

3rd. The parties filing said pretended answer and cross-bill are not defendants to the bill and cannot file pleadings or raise new issues.

BROWN, BONNELL & COMPANY,
By HENRY CRAWFORD &
A. W. JONES, *Its Solicitors.*

102 And afterwards, to wit, on Wednesday, Feb. 20th, 1884, the following order was entered in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } 4195. Chancery.

Come now the parties, by their solicitors, and the court—Honorable John Baxter presiding—orders the answer of the Commercial National Bank and others, filed herein, be considered an intervening petition praying affirmative relief, and leave is given to one or more creditors to file on or before March 1st, 1884, response to such petition testing the validity of the mortgage therein set up; and thereupon the master heretofore appointed herein is directed to hear and determine such issue and report the evidence thereon and his conclusions to the court with all convenient speed.

103 And afterwards, to wit, on the 1st of March, 1884, the following answer was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States of America, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } Answer to Intervening Petition of Com'l Nat'l Bank *et al.*

Said court having ordered that the answer of the Commercial National Bank and others, filed herein, be considered an intervening petition praying affirmative relief, and having granted leave to one or more creditors of said Brown, Bonnell & Company to file response to such petition contesting the validity of the mortgage therein set up, the Second National Bank of Ravenna, Ohio, an association duly incorporated and organized under the laws of the United States, now comes, pursuant to such leave, and for answer to said petition says that said Second National Bank of Ravenna is a creditor of said Brown, Bonnell & Company to a large amount for money received by said company from said bank, which indebtedness of said company to said Second National Bank has heretofore, under a former order of said court, upon the petition of said Second National Bank, filed with and before the master appointed by said court for that purpose, been duly proved and has been by said master duly approved and allowed as a valid and just claim of said Second National Bank against said company, reference to which petition, proofs, and proceedings by and before said master, on file in this court, is hereby made for a more full statement of the nature
104 and amount of said indebtedness.

Further answering, said Second National Bank says: It became the creditor of said Brown, Bonnell & Company as aforesaid

by means of loans of money made by it to said company at different times in the months of Dec., 1882, and Jan., 1883, in the full faith and belief that the property of said company was free and clear of incumbrance and interest, — any knowledge whatever of any existing deed of trust or mortgage of the property of said company; and said Second National Bank further says that had it known of the existence of the mortgage incumbrance set up in said answer and petition of said Commercial National Bank and others in this case it would not have loaned said money to said company and given it the credit aforesaid.

And, further answering, the said Second National Bank says that before the times it gave the credit aforesaid to said company the bonds and trust or mortgage deed to secure their payment mentioned in said answer and petition had been executed by said company, and when said credit was given as aforesaid said deed was in the hands of said Daniel P. Eells, the trustee named therein, and ninety-four of said bonds were then held, as stated in said answer and petition, as follows, to wit: Thirty by said Commercial National Bank, sixteen by said Daniel P. Eells, sixteen by said Charles A. Otis, sixteen by said William H. Harris, and sixteen by said Amasa Stone.

And, further answering, said Second National Bank says that when said bonds were so received and held as aforesaid by said Commercial National Bank, Daniel P. Eells, Charles A. Otis, William H. Harris, and Amasa Stone said Eells was the president of said Commercial National Bank, and, as this Second National
105 Bank is informed and believes, and therefore alleges the fact to be, the said Eells, Otis, Harris, and Stone were each, respectively, directors of said Commercial National Bank and of said Brown, Bonnell and Company and continued to be such officers during the period hereinafter mentioned.

Further answer- said Second National Bank says that said bonds were respectively received and held as aforesaid by said Commercial National Bank, Eells, Otis, Harris, and Stone under an understanding and agreement by them with the managing officers and agents of Brown, Bonnell & Company for the purpose of preserving the credit of said company that the existence of said bonds and deed and of their being held as aforesaid should be concealed and kept secret, and that said deed should not be placed on record unless the financial officers of said company should become embarrassed and its record required to secure said bondholders against the insolvency of said company, of which they were to be informed by said managing officers and agents, and said Second National Bank says that said bondholders, that the credit of said company might not be impaired, continued to conceal and keep secret the existence of said bonds and deed, and that they were the holders thereof as aforesaid until after the said company became insolvent and its insolvency could no longer be concealed, when, upon being so informed with full knowledge of the insolvency of said company and for the purpose of gaining an unjust preference over the other creditors of said company, on Feb. 17, 1883, they caused said deed to be filed for

record in the recorder's office of the county of Mahoning, where said mortgaged property is situated.

106 And said Second National Bank further says it is informed and so charges the fact to be that the managing officers of Brown, Bonnell & Company, until the filing of said deed as aforesaid, continued to represent Brown, Bonnell & Company as solvent, and that there were no incumbrances on its property.

Wherefore, by reason of the premises aforesaid, said Second National Bank says that the creditors of Brown, Bonnell & Co. will be defrauded by the fraudulent combination and concealment aforesaid of Brown, Bonnell & Company and the said holders of said bonds unless said deed be declared to be fraudulent and void as against said creditors; wherefore said Second National Bank prays that said deed may be held to be void as against such creditors; without this, that any other matter or thing in the said intervening petition contained material and effectual in the law to be responded unto, and not herein and hereby well and sufficiently responded to, confessed and avoided, traversed or denied, is true in manner and form as therein set forth.

LUTHER DAY,
Solicitor for said Second National B'k of Ravenna.

Edwin T. Richardson, president of Second National Band of Ravenna, being first duly sworn, says that the matters and things stated in the foregoing answer are true, as he verily believes.

E. T. RICHARDSON.

Subscribed in my presence by said Edwin T. Richardson and sworn to before me by him this 29th day of Feb., A. D. 1884.

[SEAL.] GEO. MORRISON,
Notary Public, Portage Co., O.

107 And afterwards, to wit, on March 1, 1884, the following response was filed:

In the Circuit Court of the United States, Northern District of Ohio.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND CO. } In Equity.

In the matter of the claim of Dan. P. Eells and John Hay, trustees, and the Commercial National Bank, Charles A. Otis, William H. Harris, Dan. P. Eells, and John Hay and Samuel Mather, as executors of the estate of Amasa Stone, deceased.

The respondents, The Manufacturers' and Traders' Bank of Buffalo, New York, The First National Bank of Youngstown, The Second National Bank of Youngstown, The Sharon National Bank, Charles S. Worden, The Florence Mining Company, Westerman, Filer and Co., Andrews and Hitchcock, and The Brier Hill Iron

and Coal Company, in behalf of themselves and all other creditors of the defendant, Brown, Bonnell and Co., who may choose to avail themselves of this response, make answer unto the said claim aforesaid and say:

They admit the execution and delivery of the mortgage by Brown, Bonnell and Co. to John Hay and Dan. P. Eells, trustees, in manner and form as is alleged.

They further admit that the Commercial National Bank claim to hold $150,000 of the bonds purporting to be secured by such mortgage to secure a claim it holds against the said defendant, and Dan. P. Eells, Charles A. Otis, William H. Harris, and John Hay and Samuel H. Mather, as executors of the estate of Amasa Stone,
108 deceased, each claim to hold $80,000 of the bonds purporting to be secured by such mortgage as collateral to the claims held by them respectively.

The respondent, The Manufacturers' and Traders' Bank of Buffalo, N. Y., shows that it did on the — day of ——, 1883, by the consideration of the circuit court of the United States for the northern district of Ohio, duly recover a judgment at law against Brown, Bonnell and Co. for $—, which still remains in full force, unreversed, and wholly unpaid.

The other respondents admit that they are, together with divers other persons and corporations, judgment creditors of the defendant corporation by virtue of judgment duly entered in the common pleas court of Mahoning county, Ohio, and the dates and amounts of all such judgments and the names of the judgment creditors are fully set forth in a schedule attached hereto, which these respondents pray may be taken as a part of their pleading.

And thereupon these respondents aver that, except the judgment recovered in this court and the several judgments recovered in the said State court, there are no judgments of any kind existing against said Brown, Bonnell and Co., and that said corporation is the owner in fee simple absolute of a large and valuable manufacturing property in said county of Mahoning and State of Ohio, consisting of real estate, blast furnaces, rolling mills, coal mines, machinery, equipment, and appurtenances, worth fully one million dollars, and that each and every of the judgments aforesaid from the date of its recovery became and still is a lien upon all and singular
109 real estate, paramount and superior to the claim of the said John Hay and Dan. P. Eells, trustees, or to the said alleged mortgage.

These respondents further show that the said Brown, Bonnell and Co. is a corporation organized under the general laws of Ohio regulating the incorporation of manufacturing companies, and that it has been organized for about twenty years, during all which time it has been engaged actively in the manufacture and sale of iron and has become the owner of the largest plant and trade of any establishment of the kind in the West. In order to carry on its trade successfully it was obliged to use its credit in the purchase of the large supplies which it was constantly procuring and in the discount of the paper it received for its product, and during the entire

period of its existence from the origin thereof down to February, 1883, it had never had any mortgage or other incumbrance on its property and never had issued any bonds, and in consequence thereof it had been enabled to command almost unlimited credit with banks and ore, coal, and supply firms.

These respondents further show that continuously from January, 1882, to January, 1884, Dan. P. Eells, Charles A. Otis, and William H. Harris were large stockholders in and were directors of the said Brown, Bonnell and Co. Amasa Stone was a large stockholder in the corporation and had been a director previous to 1882, and the said Eells, Otis, and Harris and Stone were large stockholders and officials of the Commercial National Bank of Cleveland.

These respondents aver that the said mortgage and bonds
110 were never authorized by any vote of the stockholders of Brown, Bonnell and Co., and were never submitted to any meeting of stockholders, and some of the stockholders did not even know of its existence until after this action was instituted and a receiver appointed.

The only authority for the execution of said bonds and mortgage was the passage of a resolution by the board of directors of the corporation on April 3, 1882, a copy of which is hereto attached, marked Exhibit "A;" and although it is by said resolution recited that it was intended to "negotiate $500,000 coupon bonds," in truth and in fact it was understood and agreed by the directors of the corporation that in order to preserve to the fullest extent the then existing credit of the corporation that it would not "negotiate" any of such securities, but that they would conceal the existence of any such encumbrance, and that the said mortgage should not be recorded and the bonds should only be used as collateral with directors and others who would be safely trusted not to disclose the existence of the encumbrance, and that by such means the credit of the corporation could be maintained during the period of depression which was taking place in the iron trade.

The said Eells, Hay, Stone, Harris, Otis, and the Commercial National Bank all understood and concurred in this arrangement, and it was distinctly agreed with the Commercial National Bank and said Stone as late as December, 1882, that unless the said Brown, Bonnell and Co. or its sales agent, John V. Ayer's Sons, should become involved so as to threaten a suspension of payment, that the said mortgage should remain unrecorded and its existence
111 concealed from all persons having dealings with Brown, Bonnell and Company.

Your respondents claim that this scheme was fraudulent as to creditors, and was devised to give such corporation a fictitious credit by holding out to those dealing with it that it was possessed, as it always theretofore had been, of a large amount of unencumbered property; and by concealing said mortgage and keeping the same from record the corporation induced your respondents and other creditors to make loans and sell supplies on credit, which they would not have done if they had been cognizant of the real state of facts.

Your respondents show that, although the said mortgage was authorized by the board in April, 1882, and was delivered to the trustee, Eells, shortly after its execution, it was not recorded until on February 19th, 1883, and was there recorded solely in consequence of a telegram from the sales agent, John V. Ayer's Sons, of that day, announcing their failure, and on said date the said Eells well knew that the said Brown, Bonnell and Co. would also be forced to suspend payment.

Your respondents aver that during the period intervening between April 3, 1882, and February 19, 1883, when such false credit was created by the fraudulent concealment of said mortgage, the said Brown, Bonnell and Co. created the entire body of its liabilities which are now outstanding and unpaid.

These respondents aver that it is contrary to equity that the parties to such a fraud are creditors and being themselves stockholders and directors of said corporation, and that the bank of which they are also officers should be allowed to claim a priority over other creditors by reason of the record of a fraudulent and
112 long-concealed mortgage when the corporation was in a failing condition, as they then well knew.

These respondents therefore claim that the said mortgage and bonds ought to be declared fraudulent and void as to creditors and the said bonds ordered to — delivered up and destroyed, and the due rights and privileges of these respondents as judgment creditors having lawful liens and prior titles on said property should be declared and protected by the court as they may be adjudged entitled.

A. W. JONES.
WILLEY, SHERMAN AND HOYT, *Solicitors.*

H. CRAWFORD, *Of Counsel.*

113 In the Circuit Court of the United States, Northern District of Ohio.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL AND COMPANY. } Equity, No. 4195.

Report of the special master upon the issues made by the intervening petition of The Commercial National Bank of Cleveland, O., Dan. P. Eells, Chas. A. Otis, *et al.*, and the response of certain creditors claiming judgment liens.

To the honorable judges of the circuit court:

By an interlocutory order made upon the application of certain creditors of Brown, Bonnell & Company it was directed that the answer of the Commercial National Bank and others filed herein be considered as an intervening petition praying affirmative relief, and leave is given to one or more creditors to file response to such petition, contesting the validity of the mortgage therein set up; and

thereupon the master heretofore appointed herein is directed to hear and determine such issues and report the evidence thereon and his conclusion to the court.

Pursuant to the above order I have from time to time heard such evidence as counsel deemed it necessary to offer and have speeded the hearing as fast as the circumstances of the case would permit. The proceedings were by mutual consent suspended for a long time, pending negotiations and arrangements between the creditors for a reorganization of the defendant Co. and a settlement of its debts. But it was in time developed that it was neces-
114 sary to have the issues involved in these proceedings brought to a final conclusion, and as soon as I was advised of that fact I proceeded in the hearing with all reasonable diligence.

The facts necessary to be understood to enable the court to pass upon the issues made by the parties to this controversy can be briefly recited.

On the third day of April, A. D. 1882, Brown, Bonnell & Company, after proper corporate legislation by its board of directors, executed an instrument in the nature of a deed in trust, but generally referred to as a mortgage, conveying to Dan. P. Eells and John Hay, as trustees, substantially all of its real property, embracing blast furnaces, rolling mills, nail factories, and valuable machinery, said property to be held in trust to secure the payment of the principal and interest coupons of one hundred bonds of five thousand dollars each, payable at stated periods from April 3rd, 1884, to April 3rd, 1892. Said instrument so authorized was signed by the president and secretary of said corporation April 3rd, 1882, but was not acknowledged by the president until June 16th, 1882, or by the secretary until June 14th, 1882. In due time the bonds authorized to be issued and so secured were signed by the proper corporate officers and delivered to the trustees. A reservation was incorporated in said mortgage by which it was provided that the bonds therein described shall be certified by the second part (trustees) according to the form of certificate above named, and until so certified shall not become secured thereby. The bonds so delivered to said trustees were held by them for issue, subject to the order of the de-
115 fendant corporation. The purpose for which said bonds were so created and executed is stated in said mortgage deed to be as follows: That whereas the party of the first —, being thereto empowered by law, has by due action taken resolved to borrow money in the aggregate of five hundred thousand dollars and to issue therefor its bonds, bearing even date herewith, one hundred in number. It appears from the records of the corporation and the evidence of its directors that when said mortgage was authorized the expectation of all its board of directors and officers was to negotiate the sale of said bonds at par, and with the aid of such a surplus fund relieve its officers and directors from the necessity of endorsing individually for the company and of negotiating temporary loans. When the bonds were executed and deposited with the trustees it was for the purpose and in expectation of so negotiating their sale in due course of time as the money might from time to time be needed. Until

the bonds were so negotiated they were not issued, so that a lien attached to the property pledged for their security, and until so issued it was not deemed advisable or necessary to record the mortgage. While the bonds were so deposited in the hands of the trustees and before sold or negotiated the corporation was unexpectedly and seriously embarrassed and involved in a prolonged controversy with its employees concerning the price of their labor. This controversy or "strike" continued for four months, and from its beginning the company was deprived of most of its revenues. The products of its furnaces and mills, which were in an unfinished condition, could not be sold. Its outstanding liabilities were maturing faster than they could be paid. In this emergency its board of directors held several meetings,
116 and it was finally agreed among those of them largely interested in the company that they would each individually indorse its notes to the extent of $50,000 and each take as collateral security an agreed number of said bonds. In pursuance of said agreement Dan. P. Eells, Amasa Stone, and W. H. Harris each endorsed $50,000 of the notes of the corporation and secured themselves as stated. Later, by agreement of said parties, the first paper indorsed by them having matured, — endorsement upon condition that Chas. A. Otis, one of their associate directors, should indorse for a similar sum, which was done. Afterwards the Commercial National Bank of Cleveland discounted the notes of John V. Ayers & Sons, endorsed by Brown, Bonnell & Company, to the amount of $60,102.94, and took thirty of said bonds as collateral security. The bonds so delivered as collateral were transferred to the holders upon written orders given by Brown, Bonnell & Company to the trustees, and said orders were given from time to time when the endorsements of said parties were made and the funds arising from such endorsements were realized by the company. The testimony shows that said bonds were so delivered by said trustees as follows:

On June 19th, 1882, Dan. P. Eells received 20 bonds of $5,000 each to indemnify him for endorsements to the amount of $50,000; on the same day W. H. Harris received 20 bonds of $5,000 each to indemnify him for indorsements to the amount of $50,000; on June 30th, 1882, Amasa Stone received 20 bonds of $5,000 each to secure him for his endorsement of $50,000 of said notes of Brown, Bonnell and Company; on Sept. 23rd, 1882, the Commercial National Bank of Cleveland received 30 bonds, $5,000 each, to be held by it as collateral security for all loans made by said bank; on Dec. 11,
117 1882, Chas. A. Otis received from Dan. P. Eells, as trustee, four bonds of $5,000 each and four bonds each from Amasa Stone, W. H. Harris, and D. P. Eells, to secure him for endorsement, to the amount of $50,000 for Brown, Bonnell & Company. By the above surrender of four bonds each of the twenty originally given to them Messrs. Stone, Harris, and Eells still held sixteen bonds each and Mr. Otis likewise held 16 bonds to secure each for his endorsement. In the meantime the strike among the employees of Brown, Bonnell & Company had determinated and its business was proceeding in its usual course. Its resources had been increased by

the pledge of these bonds, as above recited, to the extent of about $250,000. Every dollar realized upon the notes endorsed by the directors named and upon the discounts of said Commercial National Bank had been applied by Brown, Bonnell & Company in its legitimate business. Its directors testify that it was their expectation to be able in a reasonable time to pay the paper which they had endorsed from the revenues of the corporation and retire the bonds so as aforesaid held by them. Relying upon this expectation and regarding the pledging of the bonds in the manner stated as temporary use of them, they agreed not to place the mortgage securing said bonds upon record. The withholding of it from record was with the approval of all the board, including John V. Ayer, whose representative is now the chief complainant against its validity. The mortgage during all this time was in the possession and custody of D. P. Eells, one of the trustees, and with the consent of the holders of the bonds aforesaid was withheld from public record.

Most of the manufactured product of the corporation was sent
118 to John V. Ayers & Sons, of Chi., Ill., for sale on commission.

John V. Ayer was president of Brown, Bonnell & Company, one of its board of directors, and its largest stockholder. He was supposed to be a man of great wealth and enjoyed good credit. The firm paid Brown, Bonnel & Company for its products in notes, and these notes endorsed by the corporation, when discounted, were its chief source of revenue.

On Feb. 16th, 1883, John V. Ayers sent from Chicago a night telegram to Dan. P. Eells, at Cleveland, as follows: "I think you had best record mortgage on receipt of this; will see you Monday." That telegram was delivered to Mr. Eells' representatives on the morning of the 17th, and, after consultation between the parties in interest, the mortgage was taken to Youngstown by special messenger and filed for record at 2.35 p. m. that day. On the same day a large amount of the paper of John V. Ayers & Sons went to protest in Chicago, and their failure was publicly announced. Three days later, upon proceedings instituted in this court, a receiver was appointed for Brown, Bonnell & Company, who took possession of all its property.

The respondents to the intervening petition of the Commercial National Bank contend that the mortgage hereinbefore described is invalid, and that the bonds issued thereunder and now held by the parties above named are not liens upon the property of Brown, Bonnell & Company; that the mortgage was a fraudulent contrivance on the part of the directors of the grantor to secure themselves as creditors, and that it was withheld from record for fraudulent purposes, and as against creditors of the corporation cannot be enforced.

119 The evidence clearly shows that the original purpose of the directors of said corporation in authorizing said mortgage was to sell the bonds at par in open market and use the funds realized from such sale as their working capital.

That purpose is clearly expressed in the very instrument itself, as I have already shown. There was therefore nothing concealed or

fraudulently intended in the corporate legislation authorizing the mortgage or by the execution thereof. The corporation had the power to authorize and execute the mortgage. The bonds were therefore validly created and executed. If there was any fraud it was in their issue and use. They did not become a lien upon the grantors' property until they were issued and either pledged or sold. In the emergency I have referred to they were hypothecated to certain directors to secure them as endorsers upon the notes of their corporation. Said directors were no more bound to loan their credit to the corporation than any other stockholder. They had the same right to ask indemnity when they risked their personal credit for the corporation that any other endorser would have. In hypothecating said bonds to secure said directors the corporation was not giving them a preference for pre-existing debts over other creditors. It was simply offering indemnity against a contingent liability. It was incumbering its property, but it was realizing in money a reasonable equivalent. It was increasing its cash revenues from the proceeds of said endorsements about $250,000. That money was applied in its business to the payment of debts, to the purchase of supplies, and to the operating of its mills.

In none of these respects was the transaction fraudulent or
120 invalid. At the time these bonds were pledged the corporation was solvent. The board of directors believed, and had had reasonable grounds for such belief, that it would continue solvent and be able to pay the notes to secure the payment of which the bonds were pledged. They testify that they expected these bonds to be withdrawn from the pledgees, and, so withdrawn, they would no longer be a lien upon the property of the mortgagor. There is nothing in the evidence that warrants the conclusion that such expectation was not sincere or well founded in the circumstances surrounding the transaction. Under such expectations and with such purposes controlling them there was nothing fraudulent in the act of withholding that mortgage from record. There was no collusion or purpose to defraud any one by the failure to record. The mortgaged prop was worth very much more than the amount for which the bonds were pledged and to which extent only they became liens. The failure of John V. Ayers & Sons was unexpected, and explains the haste with which the mortgage was recorded. It would not be fair conclusion from the evidence before me to say that said failure was anticipated or that said mortgage was kept from record for the purpose of creating a fictitious credit in expectation thereof; neither would it be fair to conclude from the evidence that the failure to record or that the circumstances connected with the recording are inconsistent with the statements of the holders of said bonds as to the reasons which induced them to act as they did. The most serious objection that can be urged to the validity of the mortgage is that it did not, in fact, take effect as a mortgage under the laws of Ohio until filed for record in the proper office, and that on
121 that day the mortgagor was insolvent the pledgees knew it was insolvent, and that they were taking an unlawful preference; but, conceding the insolvency of the corporation on that day,

it is still claimed by the pledgees that they believed it solvent, and that they did not know the full meaning of Ayer's telegram. The evidence shows they did not know of his failure, except as they may have surmised it from the telegram; but, conceding this, the fact remains that when they incurred their contingent liability as endorsers they in good faith took these bonds from a solvent debtor for a valid purpose and withheld it from record in the interest of the mortgagor. They are therefore entitled, in my opinion, to the protection the law gives to mortgagees and pledgees who, acting in good faith, accept such security under such circumstances.

In all the cases cited by counsel for the contesting creditors the mortgages declared fraudulent and void were given to secure pre-existing debts under circumstances of bad faith and collusion between mortgagor and mortgagee. The law does not restrain an honest debtor, embarrassed and pressed with importunate creditors, from making every legitimate effort to relieve himself. He dare pledge his property to secure means with which to pay his debts or prosecute his business, so long as it is done in good faith. To deny him such a right and privilege would be in effect to place him at the mercy of grasping and unfeeling creditors the moment he became embarrassed.

In the case under consideration the directors who loaned their personal credit to their corporation did it under circumstances that indicate good faith, and the pledges they received for their
122 security, authorized and created for a valid purpose, were legally given by a solvent debtor, and the money realized by the pledges made was honestly and discreetly applied by the debtor to the proper use in its business. I am therefore of the opinion, and so report, that said mortgage is valid and in full force, and the bonds now held by said parties in pledge are valid lien of equal rank upon the property of the defendant to the amount of the notes and interest to secure which they were pledged.

In a former report made by me in this case, in which the sums due each creditor of Brown, Bonnell & Company and the liens claimed by them were fully set forth, and which report has been confirmed, I reported the sums due the parties holding these bonds te be as follows:

The Commercial National Bank of Cleveland, Ohio, the sum of	$63,720 88
Dan. P. Eells	40,052 44
W. H. Harris	40,029 18
Charles A. Otis	53,208 33
John Hay and Samuel Mather, as executors of the estate of Amasa Stone	40,049 27

I therefore report that the thirty bonds held in pledge by the Commercial National Bank of Cleveland are a lien upon the property of Brown, Bonnell & Company described in said mortgage to the sum of $63,720.88, with interest as heretofore reported.

2nd. That the sixteen bonds held in pledge by Dan. P. Eells are a

lien upon said property to the sum of $40,052.44 and interest as aforesaid.

3rd. That the sixteen bonds held in pledge by W. H. Harris
123 are a lien upon said property to the sum of $40,029.18 and interest as aforesaid.

4th. That the sixteen bonds held in pledge by Charles A. Otis are a lien upon said property to the sum of $53,208.33 and interest as aforesaid.

5th. That the sixteen bonds held in pledge by John Hay and Samuel Mather, executors of Amasa Stone, are a lien upon said property to the sum of $40,049.27 and interest as aforesaid.

All of said bonds being a lien of the same rank.

The intervening petitioners were represented by C. C. Baldwin and A. St. John Newburry as counsel, and the contesting creditors by Henry Crawford, of Chicago, as counsel.

All the testimony taken has been reduced to writing and bound in one transcript, marked "Exhibit A." The record book of the corporation is also in evidence and with the said transcript is herewith filed. The original mortgage and bonds were exhibited, but by consent of counsel a copy of the mortgage was accepted and filed.

All of which testimony so identified and filed, together with this report, is respectfully submitted.

A. J. RICKS,
Special Master.

124 And afterward, to wit, on May 2nd, 1885, the following testimony was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL AND COMPANY.
} In Equity. No. 4195.

Proceedings before A. J. Ricks, Esq., special master, Tuesday, May 13th, 1884, upon the issues made by the intervening petition of Dan. P. Eells, Charles A. Otis, William H. Harris, John Hay and Samuel Mather, executors; Dan. P. Eells and John Hay, as trustees, and the Commercial National Bank of Cleveland in behalf of the validity of the mortgage and bonds issued thereunder, executed by Brown, Bonnell and Company, and the responses to said intervening petition of the Second National Bank of Ravenna, the divers creditors of Brown, Bonnell and Company, as represented by Henry Crawford of Chicago, *et al.*

DAN. P. EELLS, of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, was examined in chief by ST. JOHN NEWBERRY,

Esq., on behalf of the Commercial National Bank *et al.*, and testified as follows:

Q. State your name, age, residence, and occupation.

125 A. My name is Dan. P. Eells; I reside in Cleveland, Ohio; I am 59 years old, and I am president of the Commercial National Bank of Cleveland.

Q. Are you the party who is referred to in the mortgage described in this cross-bill of the Commercial Bank *et al.* as trustee under that mortgage?

A. The mortgage given by Brown, Bonnell and Company?

Q. Yes.

A. To secure certain bonds?

Q. To secure certain bonds.

A. Yes, sir.

Q. Do you remember how many bonds that mortgage secured?

A. One hundred bonds.

Q. And the denomination?

A. Five thousand dollars each.

Q. Have you got the original mortgage?

A. Yes, sir.

Q. Give me the date of it, please.

A. It is dated the 3rd day of April, 1882.

Q. Do you know of your own knowledge whether the bonds described in that mortgage were issued?

A. Yes, sir.

Q. All of them?

A. What do you mean by "issued?"

Q. Whether they were executed.

A. Yes, sir.

Q. What was done with the bonds and mortgage, Mr. Eells?

A. They were placed in my hands and in the hands of Colonel Hay, as trustees.

Q. Was that at the time of the execution of the mortgage

126 or shortly after?

A. It was very shortly afterwards; as soon as the bonds could be printed and executed and delivered.

Q. You were at that time a director of Brown, Bonnell and Company, were you not?

A. Yes, sir.

Q. You may state what the intention was; for what purpose those bonds and mortgage were executed.

Objected to by Mr. Crawford, but it is allowed to go in under exception.

Mr. Newberry offered in evidence the records of Brown, Bonnell and Company, marked Exhibit "A," and attached to the statement of judgments and costs of sundry creditors of Brown, Bonnell and Company, for the purpose of showing the authorization of the mortgage and bonds and for what they were to be issued, a copy of which is hereto attached.

Q. Now, do you know of your own knowledge why this mortgage and bonds were authorized?

A. Yes, sir; I was present at the meeting of the board of directors that authorized the mortgage.

Q. Well, can you state why this mortgage and bonds were authorized?

A. The corporation of Brown, Bonnell and Company were carrying a considerable indebtedness at different places for the purpose of promoting their business, which was very large, and it was thought by the board of directors that if a mortgage of not more than five hundred thousand dollars could be executed and the bonds
127 sold, carrying only six per cent. interest, that it would be better for the company than to continue the large line of discounts at different places that they were carrying, and the mortgage was issued with a view to getting the bonds ready for sale when the condition of the country and of the money market was such that they could be negotiated at par, the object being to prevent the company from paying the large amount of interest that they were paying and to save any inconvenience to the company from inability to get discounts.

This evidence is allowed to go in subject to exception.

Q. You may state whether those bonds were ever actually sold in the market.

A. No, sir; they were not.

Q. Why not?

The same objection is made to this question as above noted.

A. They were not sold because the money market of the country was in such a condition that the bonds could be placed at par. It was not contemplated that they should be sold immediately when they were issued, but that they should be *sold to sell immediately when they were issued, but that they should be* ready to sell when the conditions were favorable for their being placed on the market.

Q. It appears in this bill, Mr. Eells, and in your claim originally filed that endorsements of Brown, Bonnell and Company, of which copies are set out in this bill, were made by you and other parties. Referring to the endorsements made by you, please state at whose request and under what circumstances those endorsements were made. State first whether you did make the endorsements referred to there.

A. Yes, sir.

Q. State under what circumstances and at whose request
128 they were made.

A. On the 1st of June succeeding the issuing of this mortgage there occurred a very extensive strike throughout the country among iron workers and puddlers of iron, which was participated in by the operatives of Brown, Bonnell and Company. The works were brought to a close. The company at that time had a large amount of iron partly finished and material in process of completion which in the state of the market they were unable to sell. They

were carrying a very large amount of indebtedness. Their means for realizing were entirely cut off, because of their inability to sell the iron which was in process of manufacture. Mr. Mathews telegraphed, I think, to me at Cleveland, some time in June, asking where and when a meeting of the board of directors of Brown, Bonnell and Company could be had, and I am not quite positive whether that telegram was to me or to Mr. Otis, but I think it was to me, and the reply was made that Mr. Stone was not able to go out; he was not in good health; that if the meeting could be held here it could be held at any time, and the meeting was held at the house of Mr. Stone. Mr. Ayer, Mr. Mathews, and Mr. Williams were present; Mr. Stone, Colonel Harris, and myself were present. Mr. Ayer stated the circumstances. He said (interrupted).

This is objected to on the ground that Mr. Eells is testifying to a corporate meeting, and that it is a matter of record.

(The WITNESS:) It was not a meeting of record; it was for consultation as to the financial wants of the company. Mr. Mathews asked when the meeting of the board of directors could be
129 held. I don't — the board was organized as a board, nor that any record was made of it.

The objection is insisted on, but on another ground.

(The WITNESS:) After considerable talk Mr. Ayer stated that the company would require at least two hundred and fifty thousand dollars of paper to be endorsed for the company; and the arrangement was made at that meeting that Mr. Stone would endorse fifty thousand dollars of the paper of the company if Mr. Harris and I would each endorse fifty thousand and Mr. Ayer endorse fifty thousand, and that we were to receive as security the bonds that were then in the hands of the trustees, at the rate of fifty per cent. of their par value, as collateral security for these endorsements. The Commercial National Bank—at that time the matter of a discount at the Commercial National Bank was also brought up and an agreement was made. A statement was made by the officers of the bank, who were present, that the board would loan to the company, at the same rate, a certain amount of money. Whether the amount was agreed upon at that time I cannot say. It was at the same rate, with the bonds to be hypothecated, and subsequently an endorsement was made as agreed upon at that time. The question was asked by Mr. Mathews whether the parties endorsing this paper would extend the paper—would renew if it should be necessary—and the reply was made very distinctly and emphatically on the part of Mr. Stone that he would not renew it, and it was understood by all of us that the paper was not to be renewed, and Mr. Mathews and Mr. Ayer both stated that should the mills again commence working the company would have no difficulty in meeting the paper at the time when it would mature.

130 Q. Were these endorsements actually made?

A. They were. I will say that Mr. Ayer did not take the bonds. His relations to the company were such that he did not

take the bonds to which, under the agreement, he would be entitled if it had been insisted upon. Other parties took them.

Q. You held these bonds as trustee at that time?

A. Yes, sir.

Q. Did you deliver the bonds to the various parties and endorsers in the proportions agreed upon?

A. Yes, sir.

Q. At whose request did you make those deliveries?

A. Mr. Mathews'.

Q. Were those deliveries in writing?

A. It was in writing.

Q. Were they in the nature of written orders from the trustees?

A. They were.

Q. Have you the orders in your possession?

A. I think they are in the possession of the court. I think they were surrendered with the other papers when the claims were filed, but if I have not given them to the court they are in my possession.

(Mr. NEWBERRY:) We will just use the copies and use the originals this afternoon. The original orders are introduced in evidence.

Q. Are those the orders of which you speak, Mr. Eells?

A. Yes, sir; they are.

Q. You say that you endorsed paper to the amount of fifty thousand dollars?

A. Allow me to say that I notice that these are dated at different times. The one to the Commercial Bank is dated in September;
131 therefore I think I was in error in stating that the arrangement for a discount was made at this time. Either that is true or else I delivered on the verbal order of Mr. Mathews the bonds, and subsequent to his written order, when a discount was to be made, not seeing him at that time. I cannot account for the discrepancy of the dates in any other way. Either the arrangement was made afterwards or else the bonds were delivered on the verbal order, for which a written order was subsequently made.

Q. Please state again for what purpose the funds to be obtained by these endorsements were to be used.

A. They were to be used for the purpose of meeting the paper and protecting the credit of Brown, Bonnell and Company during the time when the strike was in progress at the works, so that they were not able to realize on their iron.

Q. Tell me how long that strike lasted.

A. I think it lasted about four months.

Q. And began when?

A. About the 1st of June.

Q. And lasted to the first of October?

A. Yes, sir.

Q. Was any portion of this paper which you endorsed paid?

A. Yes, sir. Shall I state further? I have not got through with the endorsements yet. I simply stated what occurred at the time of the first meeting. After the strike had been in progress for some

time and after a portion of this paper had been paid, I don't remember the time—a considerable time after the first meeting that I speak of—and after a portion of the paper endorsed at that time had
132 matured the same parties again came to Cleveland and stated that they would require some more money, and that some of the paper would have to be extended, because the strike had lasted very much longer than expected. Mr. Otis was present at the time; he had made no endorsement on the paper, and we held a meeting at the house of Mr. Stone again. Mr. Otis was present.

Objected to.

(The witness resumes:) At that meeting it was agreed, after considerable discussion and after some objection on the part of Mr. Stone particularly, that the parties whose paper had matured and been paid by the company, amounting, in my opinion, to between 7 and 8 thousand dollars upon each, that we would endorse new paper of the company to the amount of that which had been paid, bringing the amount up to the original limit of fifty thousand dollars, provided Mr. Otis would also endorse fifty thousand dollars of the paper, the same amount that we had endorsed, and in that way that they would be able to go through without any trouble. That arrangement was made, so that we each held eighty thousand dollars of bonds to protect fifty thousand dollars of endorsements, and I think that was the time that arrangement was made for discount at the bank.

Q. Was it during the continuance of this strike that you have been talking of?

A. Yes, sir.

Q. And were those additional endorsements made?

A. Yes, sir.

Q. How much, if any, Mr. Eells, of the paper on which you were thus liable, that you thus endorsed, was paid?

A. Do you mean of the original endorsements?

133 Q. I mean of the final endorsements, after this meeting in September. You had endorsed fifty thousand dollars?

A. Yes, sir. When the company failed they had paid twelve thousand five hundred dollars and perhaps a few cents over. The amount due to me was $37,499 and something; the balance of the paper between that and fifty thousand had matured and been paid by the company.

Q. Was there any — this paper past due at the time—of the company's paper?

A. No, sir.

Q. Then, they had paid all the paper that was matured up to that time?

A. Yes, sir.

Q. Do you know of your own knowledge whether that was the case on other paper that was endorsed?

A. Not of my own knowledge.

Q. Do you know with reference to the commercial bank whether that was the case?

A I know that the commercial bank held no paper past due.

Q. And since you spoke of the failure, do you mean the time when the receiver was appointed?

A. Yes, sir.

Q. Since that time what has been done with that paper which you had endorsed?

A. I paid it.

Q. Had you paid it all?

A. Yes, sir.

Q. Mr. Eells, was that mortgage recorded when it was delivered to you at first?

A. No, sir.

134 Q. Why not?

A. As I stated, originally the purpose was not to negotiate the bonds until such time as they could be sold at par, because there was no authority to sell them at less, and it was the sense of the board that they should not be sold less than par, and I think Mr. Mathews asked the question either of me directly, after the meeting of the board, or it was a matter spoken of in the board, asking if it would be necessary to record the mortgage.

(Objected to.)

(The witness resumes:) And I stated my opinion that until the bonds were sold or there was some probability of them being sold there was no necessity that the mortgage should be recorded, inasmuch as it would be simply showing the public what was not true, that the company owed an indebtedness of five hundred thousand dollars, which they did not owe, because the bonds were in the hands of the trustees and had not been negotiated.

Q. Then, the mortgage was not then recorded?

A. No, sir; it was recorded immediately after the failure of J. B. Ayer's Sons, of Chicago, whose suspension caused the failure of Brown, Bonnell and Company.

Q. At the time when these endorsements were made the mortgage was not then placed on record?

A. No, sir.

Q. Why was it not then placed on record?

A. Because the company expressed their entire opinion, the strongest opinion, that the paper that we had endorsed would be taken up at maturity. They did not suppose that the bonds

135 were used except as a temporary pledge, and for the same reason that the mortgage was not originally recorded. Being in the possession of the trustees and knowing that it could be recorded at any time, it was not thought necessary to record it. It was not thought that the bonds would be relied upon to pay the endorsements, but they were expected to be paid out of the business of the company.

Q. State whether you then or at any time made an agreement with any of the officers of Brown, Bonnell and Company or with any other person to hold that mortgage off the record.

A. No, sir.

Q. You say this mortgage was recorded immediately after the failure of J. B. Ayer's Sons. Tell me why it was then recorded. I ask you of your own knowledge.

A. I was not in the country. I was in Arizona at the time of the failure. I am not able to answer it of my own knowledge.

Q. Do you know of your own knowledge that the mortgage was recorded after the failure of J. B. Ayer's Sons?

A. Only by the record of the certificate upon the mortgage.

Q. Do you know who recorded the mortgage, Mr. Eells?

A. Who had it recorded, do you mean?

Q. Yes.

A. It was taken down by Mr. Colwell, the cashier of the bank, and the record was obtained by him.

(Mr. NEWBERRY:) It appears on the original mortgage here, which we have offered already, that it was received for record on the 17th of February, 1883, and we introduce this mortgage, with the endorsements, in evidence.

136 Cross-examined by Mr. CRAWFORD:

Q. Mr. Eells, be good enough to state the names of the persons who claim to be secured by the bonds issued under this mortgage to yourself and Mr. Hay.

A. The persons who were secured under it?

Q. Yes.

A. At the present time, you mean, or who have at any time been secured?

Q. At the present time—the time of the failure. There has been no change since then?

A. No, sir.

Q. At the time of the failure, then?

A. The Commercial National Bank of Cleveland, William H. Harris, the estate of Amasa Stone.

Q. Mr. Stone was living at the time of the failure?

A. Yes, sir; and myself and Mr. Otis. I believe that is all.

Q. You, Mr. Stone, Mr. Harris, and Mr. Otis were, all of you, were you not, when this mortgage was executed and when the failure of Brown, Bonnell and Company occurred, directors of the corporation?

A. Yes, sir; except Mr. Stone.

Q. At that time you think Mr. Harris went in?

A. No; he was in before.

Q. Who took Mr. Stone's place?

A. I think it was Mr. Chambers.

Q. Just at the time of the failure Mr. Stone was not a director?

A. No, sir; he was not; the election occurred in January and Mr. Stone was not re-elected.

137 Q. I will change the question, then: Were not Mr. Stone, Harris, Otis, and yourself directors of this corporation prior to January, 1883?

A. Yes, sir.

Q. And were not you all such directors at the time of the execution of this mortgage and at the time of this arrangement that you have spoken about, that took place twice at the house of Mr. Stone?

A. I think we were, sir.

Q. Now, with regard to the Commercial National Bank. You are president of that institution, are you?

A. Yes, sir.

Q. Was Mr. Stone, at the time of this mortgage and up to the time of the failure of Brown, Bonnell and Company, a director and a large stockholder of the Commercial National Bank?

A. Yes, sir.

Q. Was Mr. Otis a director of the bank?

A. Yes, sir.

Q. Was Mr. Harris a director of the bank?

A. No, sir.

Q. Mr. Eells, you have been more or less acquainted, have you not, with the affairs of Brown, Bonnell and Company for some years?

A. Yes, sir.

Q. Before this mortgage was executed in 1882, did your company ever have any mortgage upon its property?

A. No, sir; I think not.

Q. Are you not quite clear that it never did?

A. It never did while I was connected with it.

Q. You had more or less relations with it before you were connected with it in your banking arrangements—you had knowledge of its affairs, more or less, particularly?

138 A. I never had any knowledge of its affairs. We occasionally discounted for it. I had no stock in it.

Q. Is it not your clear impression, gained from your previous business experience and your knowledge as a director, that before this time there never was a mortgage executed by that corporation?

A. I think there was not; I don't know.

Q. At the time this mortgage was executed you may state whether or not the credit of Brown, Bonnell and Company was good.

A. It was good.

Q. How much of a debt were they carrying at that time?

A. I could not tell you.

Q. About how much credit?

A. That I could not tell you; it was quite a large amount.

Q. Cannot you approximate it?

A. No, sir; I could not state with any certainty. I could not approximate it because I never gave any particular attention to it.

Q. Was it not a subject of discussion?

A. I only know it was quite a large amount and constantly changing.

Q. Was it not in consequence of the necessity to protect that very credit that the scheme of getting up this mortgage was talked about?

A. Yes, sir.

Q. Do I understand you to state, then, that, being a director of that institution, that you carry now with you no memory of what the amount of that credit that was being carried was?

139 A. No, sir; except that it was constantly changing and it was a large amount of money, I could not give you within one hundred thousand dollars of it.

Q. Can you give within two hundred thousand dollars of it?

A. No, sir.

Q. Can you give within any maximum or minimum what its liabilities were?

A. I should say that the amount of paper that the company was carrying from time to time would vary from three to five hundred thousand dollars and sometimes more than that. It varied with the exigencies of the business and the amount of iron that they were manufacturing and selling and the demand of the market.

Q. The first idea connected with this mortgage that you have testified about was to make a sale in the open market of the first-mortgage bonds on the whole property of Brown, Bonnell and Company, was it not?

A. I did not say anything about selling in the open market, but they were to be sold out.

Q. Was there ever any order of the board giving any direction to any officer or committee of the directors charged with the negotiation of those securities?

A. I don't think there was, and yet I am not quite certain about that.

Q. The determination that you have spoken about rested, so far as you know, by oral understanding between the members of the board?

A. Yes, sir; there was a general understanding that if the bonds could be sold at par that they were to be sold. I don't know whether there was any formal action taken appointing a

140 committee to negotiate them or not.

Q. The original purpose connected with the execution of this mortgage entirely failed, did it?

A. I don't know that I could say that. You could judge of that as well as I could.

Q. I will ask you if any part of the original intention of the execution of this mortgage was that they were to be put into the hands of directors or anybody else for the purpose of securing endorsers?

A. That was spoken of at the time of the authorization of the mortgage that in case the exigencies of the company would require it they would be a good collateral to be used for the company, even if they were not sold, but the understanding was that if they were used in that way it would be a mere temporary use.

Q. I understand you to state that the meeting which occurred between yourself, Ayer, Williams, Mathews, Otis, Stone, and others were meetings which took place at Mr. Stone's residence here in the city, and were not at all meetings of the board of directors as such?

A. If you understood me to say that, you did not quite understand

me correctly. I said I was not aware, I did not know, whether they were treated as formal. The board of directors were, I think, all present at one time, but whether it was a meeting of record, whether a record was kept of the proceedings, I don't know.

Q. Have you ever made examination to see?

A. No, sir; I never have. I don't know whether Mr. Mathews kept a record of the proceedings and whether they were re-

141 corded or not.

Q. Mr. Mathews was not secretary, was he?

A. No, sir; Mr. Wick was at that time secretary of the board. I am not certain about that. Mr. Jones was secretary of the company, and I believe he was present at one of the meetings; which one I don't know.

Q. Are you not aware that there is no record upon the books of the corporation of any such meeting?

A. No, sir; I am not aware of it. I have never seen the record.

Q. I understand you, then, to state that all the arrangements under which yourself, Mr. Stone, Harris, Otis, and the Commercial Bank claim the right to hold these mortgage bonds arose from these negotiations or interviews at the house of Mr. Stone?

A. That was the time when the agreement was made; yes, sir.

Q. I understand you to say, Mr. Eells, that it was distinctly agreed at this original June meeting at the house of Mr. Stone that there were to be no removals of this papers?

A. Mr. Mathews said that in case we should not be able to pay this paper at maturity in consequence of the strike, "What is the understanding in regard to a renewal of the paper?" Mr. Stone spoke up and said emphatically that so far as he was concerned there was to be no renewals, and we all said substantially the same thing, and Mr. Ayer said there would be no necessity for renewals; that the strike would undoubtedly be over before the paper matured, and they would be able to pay the paper; there was no written agreement about it.

Q. Was there any substantial understanding reached that the primary endorsement was to end and close the transaction?

A. It was understood that they would be able to pay the

142 paper. We did not agree to any renewals.

Q. Recalling your attention, then, to the Exhibit No. 3, dated June 19th, 1882, and which purports to be an order by Mr. Mathews, as treasurer, covering bonds for yourself and Mr. Harris, be good enough to explain how it comes that that order is worded as it is.

A. Do you refer to the phrase "And all renewals and partial renewals of the same?"

Q. Yes.

A. It was to cover any possibility that they might not be able to pay the paper. When I said that the understanding was that there was to be no renewal, of course the endorsement had been made; and if the company were unable to pay the paper they would not be debarred from renewal, if it was necessary.

Q. Do I understand you to say that you have made the endorsements before the orders were given?

A. I think it was simultaneous with the giving of the orders. It was within a very short time, I am positive about it.

Q. I understood you to state that no orders were given other than those four orders?

A. Was there an order there to Harvey H. Brown?

Q. No—that is, the thirty thousand bonds outstanding now. I am speaking about these that are claimed to be held by parties that are enforceable. They are all covered by these orders and there had been no other orders given?

A. No, sir; none to my knowledge.

Q. I call your attention to the order given to Mr. Stone and ask you to explain the discrepancy between the form of that order
143 and the form of the orders to yourself and Mr. Harris with regard to provision for renewals.

A. Well, sir, I cannot explain it. The orders were not drawn after any particular form, and my impression is that Mr. Stone came in and presented his order before the order was presented for the bonds to me. My impression is that I drew the form for the order for my bonds and Mr. Harris'. Mr. Mathews drew the other. That is my opinion without being able to distinctly recollect the circumstances that would account for it; but I did not draw the orders on any particular form; I drew them as the thing came into my head.

Q. I understand from you that these orders were not given except simultaneously with the endorsements?

A. They were given at the time or about the time. There might have been a difference of a day or two.

Q. So that at the time these June orders were given endorsements to the amount of one hundred and fifty thousand dollars were made by yourself, Mr. Stone, and Mr. Harris?

A. About that time, sir. It is a good while ago and I cannot remember all the circumstances that occurred with great distinctness.

Q. Now I understand you to say that the second meeting took place at the house of Mr. Stone, in Cleveland. About what time do you locate that?

A. It was some time afterwards; I don't remember how long. The shortest of the notes that were endorsed in accordance with the first understanding was—but one note endorsed by each party had matured at the time of that meeting and been paid, of 7,500 and some odd dollars—I think of 7,300 and some odd dollars; but I judge it must have been held some time in September, but I am not positive.

144 Q. Then as the matter stood, at the second interview, I understand you to state of the fifty thousand dollars that had been endorsed by each of you three directors a certain amount had been paid?

A. Yes, sir.

Q. And you think that amount was about fifteen thousand?

A. I think between seven and eight or eight and nine thousand to each party.

Q. Something less than ten thousand?

A. Yes, sir.

Q. That left you still, each of you, endorsers on outstanding paper up to the amount of about forty thousand dollars or a little more?

A. Yes, sir; forty one or two thousand dollars, I think.

Q. At this second interview Mr. Otis was asked to come in and endorse fifty thousand?

A. Yes, sir.

Q. And each of you to increase your endorsement so as to make it fifty again?

A. Yes, sir.

Q. Now, to refresh your recollection with a copy of these notes marked Exhibit "L," state whether you are not entirely incorrect in your memory of the transaction. Are not those the notes that were outstanding at the time of the sale, on which you were personally endorser, and which you subsequently paid after the failure of the company and which constitute the basis of your claim?

A. Yes, sir; I think they are. These are the notes, five of them.

Q. Well, those five notes, marked Exhibits "L," "M," "N," "O," and "P," are the notes that were outstanding at the time of
145 the failure?

A. Yes, sir; and I think they are renewals of the notes that were given in June.

Q. They are all of them, you say? Look at them again and refresh your recollection.

A. I think they are all renewals of the original notes given, except possibly the one that was given. I think this first note of October 19th was given to take up the note which had been paid. I think it was 8,300 instead of between seven and eight thousand, as I said.

Q. Do you think, then, that this note was a new note and not a renewal?

A. I think it was a note given. Now, if you allow me to explain: I think that meeting must have been held in October—about that time—and that note was given by me in order to make up my amount of fifty thousand dollars.

Q. As a new transaction?

A. Yes, sir; in accordance with my understanding at the same meeting.

Q. That was not given in renewal of any note that was then outstanding, was it?

A. It was given as renewal of a note that I was endorser on.

Q. I understand you to say that the outstanding note to the amount of between eight and nine thousand dollars had been paid. Am I correct or incorrect?

A. I will explain it. We agreed that we would bring the amount of our endorsements up to the original amount—that is, we were reendorsers on the paper that had been paid on which we were; that we would again endorse more paper to that amount. You may call it a renewal or new paper, as you please—and that was the one I gave to bring my amount to fifty thousand.

146 Q. You think that the note of October 19th, 1882, was an original endorsement of that amount under the new arrangement that brought in Mr. Otis?

A. I think it was given, as I said, to make the amount of my endorsements what they originally were.

Q. And that that represented the amount that the company had previously paid off on which you were endorser?

A. Yes, sir.

Q. And that these later notes are renewals of the endorsements that were originally made by you in June?

A. Yes, sir; that is my impression.

Q. Now look at the Exhibits 6 to 10, purporting to be the paper claimed by the Stone estate, and state whether or not the original note there—I will ask you first what the first note there was of $8,333 that bears Mr. Stone's endorsement?

A. Well, it was one of the notes given by Mr. Stone in renewal of his original endorsement of June 19th. If you refer to this note, I mean a renewal. The last paper in this exhibit is dated October 19th, the same as my last note for $8,333, and was undoubtedly given the same as mine was. The last note there bears the same date as my note.

Q. The note dated October 19th was a note that had its origin in the same way that your note of the same amount and same date had?

A. Yes, sir.

Q. And all of those others are renewals of notes?

A. I presume they are.

Q. Now state what arrangements there was made between Mr. Stone and anybody at that time whereby Mr. Stone agreed to renew his paper. I understand you to say that he did not agree to
147 renew it originally?

A. Yes, sir.

Q. I call your attention to the language of the order, in which there was no provision for a renewal. Now, under what arrangement was it that Mr. Stone was to hold any bonds for these renewals that were not covered, so far as he was concerned, by the original arrangement?

A. There was no arrangement so far as I know. The arrangement with respect to renewals was the same with all of us. There was no exception made in the case of Mr. Stone at the original meeting, but I used Mr. Stone's name because he stated that he would be unwilling to endorse the notes with any understanding whatever that they were to be renewed. He stated at the time most emphatically that he would not renew them. He was not asked to renew them, but the question was asked by Mr. Mathews whether it was expected that these notes would be paid or renewed and Mr. Stone said that he would not renew them, but it appears that he did renew them.

Q. Calling your attention to the notes exhibited by Mr. Harris, please state whether or not the note for the similar amount and of the same date, bearing the endorsement of Mr. Harris, had its origin in the same way.

A. I have no doubt it did, sir.

Q. Have you ever made an explanation [examination] while you

were a director of Brown, Bonnell and Company to see whether the books of the corporation contained any record of any order authorizing any officer to make this arrangement with you gentlemen?

A. No, sir.

148 Q. Who represented the Commercial National Bank at this interview at Mr. Stone's house?

A. I am not certain that that arrangement was talked over at Mr. Stone's house. I was the president of the bank, Mr. Stone was the vice-president, and Mr. Otis was a director. If anything was said there that made it necessary that the bank should be ready we would probably, any of us, be authorized to represent it; but I am not certain of it.

Q. I ask you whether the officers of the bank, or so far as the arrangement for the bank was made by some one of you gentlemen there acting as representative of the bank.

A. No, sir; there was no representative of the bank there. If anything was said about it the question was asked by Mr. Mathews with reference to it and simply an opinion expressed as to whether the bank would meet their wants, and the negotiation was made subsequently at the bank, with Mr. Caldwell, I have no doubt.

Q. This mortgage that was executed to yourself and Mr. Hay covers, does it not, the entire property of Brown, Bonnell and Company?

A. I think it does. No, sir; I don't think it covers the interests that they had outside of Youngstown; it covers their real estate in Youngstown and their mill there.

Q. And working plant there?

A. Yes, sir.

Q. Does it not cover personalty, too?

A. It covers a certain amount of shares of stock.

Q. I understand you to state that the assignment of the Mahoning coal stock was delivered to you in April, contemporaneous

149 with the execution of this instrument.

A. It was.

Q. And the stock was delivered itself, was it?

A. Yes, sir.

Q. When did you first get this mortgage; when did it first come into your hands?

A. I am not able to tell you that. I think the mortgage and bonds were delivered to me very soon after they were executed. What is the date of the mortgage—the 3rd of April?

Q. Yes; the third of April. Have you any remembrance about it?

A. No, sir; I have not. It would take some little time to print the bonds and execute them, but how long it took I don't know.

Q. How long do you think it was before the date that intervened after the meeting at Mr. Stone's house in June and the carrying out of that agreement, the understanding that was reached there? It took a few days, did it?

A. I think that the notes were executed the next day. That is my opinion. I think Mr. Mathews and Ayer came up the next day.

Q. How long do you think you had possession of that mortgage before that time? The first appears to be dated the 19th of June, 1882.

A. Well, I should think from four to six weeks. I think that they were put into the hands of the printer immediately after the action authorizing them, and that they were executed, with the mortgage, as quick as they could reasonably be done. I should think that I might have got them by the 1st of May.

Q. Did you get the mortgage at the time you got the bonds?

A. I could not say; I think I did.

Q. Is the mortgage in the same condition now that it was
150 when you received it?

A. With the exception of the certificate of record.

Q. And you think you had it six weeks before the June arrangement?

A. I had it some time. I made up my mind from the probable time it would take to execute the bonds.

Q. I call your attention to the fact that the mortgage was not acknowledged until the 16th of June, 1882, three days before this June arrangement. Please explain that.

A. I cannot explain it.

Q. Is it not a fact that that mortgage was not executed at all until this arrangement was made with regard to the directors' endorsements; that it was then sent to New York to Mr. Ayer, who was there, and that he executed it in New York and then returned it to you, and then this arrangement was carried out on the 19th of June?

A. I have no remembrance of it, and I had nothing to do with sending it to New York.

Q. You are in error in stating that you had that mortgage four to six weeks before the 19th of June.

A. Well, it would seem from this date that I am.

Q. As it now turns out, the mortgage was acknowledged by the president three days before this arrangement of the directors, was it not?

A. That seems to be the date of the arrangement; yes, sir. That may have been in my hands before it was acknowledged.

Q. Was or was it not? That is what I am trying to find out.

A. That I don't remember.

Q. You stated that it is in the same condition now that it was when it reached your hands.

151 A. Well, I spoke from memory. It is a good while ago. I said that because I did not remember at that time that any change had been made in it, and I took it for granted that it was in my hands. I still think it was in my hands with the bonds for a good while before the bonds were issued, and *it is* the only way that I can account for it is that I must have — mistaken in saying it was in the same condition, and when it was found to be necessary to use the bonds as collateral that this fact that it was not acknowledged was discovered. I spoke of that as a possible explanation of

a circumstance that I did not remember anything about. It was then sent on.

Q. Do you remember anything about sending it on?

A. No, sir; I do not.

Q. You are not prepared to state that you said it was a possible occurrence?

A. Yes, sir. I had the impression that the mortgage was in my hands for a considerable time with the bonds before that transaction.

Q. Was it ever in Mr. Hay's hands at all?

A. I don't know that the mortgage was ever in Mr. Hay's hands.

Q. Did he ever see it?

A. I don't know that.

Q. Did he ever know anything about it?

A. I don't know that.

Q. Did you ever tell him anything about it?

A. Whether the mortgage was in my hands I don't know, but he knew about it.

Q. When did he certify to the bonds?

A. I cannot tell you. He put his certificate on the bonds as a trustee.

152 Q. I call your attention to the attesting clause of that instrument and ask you to explain how it is that Mathews and Hay and yourself accepted that mortgage in accordance with its terms.

A. I cannot explain it.

Q. The mortgage provides that you should accept it and attach your signature, does it not?

A. Yes, sir; it so provides.

Q. Do you know whether Mr. Hay ever saw that mortgage?

A. I do not.

Q. Mr. Eells, I shall have to ask you to be kind enough to examine your correspondence and find out whether you ever did send this paper away after you had it to Mr. Ayer. You observe it is executed in New York. Whether you ever sent it to Mr. Ayer in New York after you once had it.

A. I have no remembrance of any such thing. I don't think I ever sent it to him.

Q. That being your present state of memory, don't you think that mortgage did not reach your hands until after the 16th of June, 1882?

A. I have no impression about it. My impression was that the mortgage was with the bonds. I know that the bonds were in my hands for a long time before. It is possible that Mr. Jones, under whose advice the mortgage was drawn—it is possible that he had not given me the mortgage until about the time when the bonds began to be used, and when he found it was necessary to use them sent it to Mr. Ayer to be executed.

Q. You observe that Mr. Jones, the secretary, did not acknowledge it until the 14th of June, two days before Mr. Ayer did?

A. Yes, sir; if the mortgage was in his hands instead of
153 mine and it was found that the bonds were going to be hypothecated it would show that I was mistaken in saying I had possession of the mortgage at that time.

Q. Your memory thus refreshed stands now, does it not, that that mortgage never reached your hands until after the 16th of June, 1882?

A. It would seem that the mortgage came into my hands after that time.

Q. And, taking into account the usual time that elapses in carrying a package by express or by mail, it certainly could not have reached your hands before the 17th or 18th of June, could it, that being acknowledged on the 16th?

A. No, sir.

Q. So that in reality for the first time it reached your hands on the day before these orders were executed, on the 19th of June?

A. It is possible that Mr. Jones brought up the mortgage to that meeting executed at that time and handed it to me.

Q. And for the first time you think the mortgage was delivered to you practically cotemporaneous with the arrangement made at Mr. Stone's house?

A. I should think it not improbable, sir. The bonds, however, were in my hands before that.

Q. Was there anything said at this first meeting with regard to recording or not recording that mortgage, the first meeting at Stone's house?

A. I don't remember that anything was said about it.

Q. You certainly, then, had in your possession, did you not, this mortgage from somewhere about the 17th of June continuously until it was recorded, on the 17th of February?

154 A. Yes, sir; I think so. I have no doubt about that.

Q. Eight months?

A. From the time of the execution of the notes until that; yes, sir.

Q. And during all that time yourself and your codirectors held as collateral, did you not, all the bonds that were issued under that instrument, with the exception of those that were held by the Commercial National Bank?

A. All but thirty thousand.

Q. And you claim to hold them as pledges for value during the entire eight months that that mortgage was not upon record?

A. Yes, sir.

Q. Did you disclose that fact to any of the creditors of Brown, Bonnell and Company?

A. I don't think I did.

Q. What would have been the effect upon the credit of Brown, Bonnell and Company if that mortgage had been put upon record?

Objected to as incompetent.

A. It would have been impossible for me to tell what the effect

would have been. If it were understood by the creditors that that mortgage—that the mortgage was simply held as collateral for endorsements given to pay the paper and to protect the credit of Brown, Bonnell and Company, I don't think it would have had an unfavorable effect upon their credit. If the facts just as they existed were stated—if there was a general impression made that there was a mortgage put on record for five hundred thousand dollars and nothing was known of what the mortgage was for—it was understood that they were carrying a large amount of discounts in addition to the five hundred thousand dollars—I think that the effect would
155 have been bad on their credit.

Q. The mere recording of the instrument, then, unaccompanied with explanations that would lead to accurate knowledge of the facts, would have been disastrous to the credit of Brown, Bonnell and Company, would it not?

Objected to.

A. It might have been unfavorable to their credit; yes, sir.

Q. Why did not you put that mortgage upon record?

A. Simply because we supposed that the condition of Brown, Bonnell and Company was—the financial condition was good, and with the suspension of the strike there and the resumption of work and business by the Company we supposed that this paper would be paid, and that the bonds would remain in the hands of the trustees again, just as they were placed there originally, until such time as the bonds should be sold, and then of course, the bonds being sold, the obligations of the company would be retired.

Q. The strike, as I understand you to say, ended in October?

A. Yes, sir.

Q. It was originally thought when this first transaction was made—in June, I understand you to say—that you acted upon the assurance that before that paper would be matured the company would be able to cancel the whole transaction?

A. Yes, sir.

Q. When October came you found that that had miscarried?

A. Yes, sir.

Q. And that the company were not able to take up the paper?

A. Yes, sir.

Q. Had in fact taken up only about eight thousand dollars out of fifty of each endorsement?

A. Yes, sir.

Q. Then new arrangements were made to carry on a sec-
156 ond batch of endorsed paper?

A. The paper was renewed.

Q. And more added to it, to wit, Mr. Otis, was there not?

A. Yes, sir.

Q. Was there anything said then about still keeping this mortgage off the record?

A. I don't think there was.

Q. Why did not you record it then?

A. For the same reason that we did not record it at first.

Q. You still entertained the hope that the company would get out of its difficulties?

A. We had no difficulty except the strike. We had no doubt about the company being able to pay all its paper.

Q. I understand you that at a subsequent interview there was arrangements made for discounts at the Commercial National Bank.

A. I don't know when that arrangement was made, whether it was by Mr. Mathews at the bank or in interviews.

Q. What is your impression, whether it was an arrangement substantially accorded to at the second interview at Mr. Stone's house and subsequently carried out by Caldwell, your cashier, or whether it was an arrangement directly with Mr. Caldwell?

A. My impression is it was spoken of in a general way at the meeting; that Mr. Mathews or Ayer stated that they had previously had a considerable line of discounts at the bank. I don't remember what the collateral was, but I think they had the collateral and endorsements and considerable of them before. It
157 was my impression that Mr. Ayer or Mr. Mathews spoke at the time of this meeting that they might want the bank to discount something more and hypothecate these bonds with them.

Q. Did you, as president of the bank, come to an understanding that the bank would do that?

A. No, sir; I think the definite arrangement was made with Mr. Caldwell afterwards.

Q. Was it not made with Mr. Caldwell in the office of the bank, and was you and Mr. Stone not present when Mr. Mathews came over there?

A. I think not. I think it is probable that Mr. Caldwell brought it to the attention of the meeting of the board, held every day at half past twelve o'clock, and I think the arrangement was made with Mr. Caldwell and submitted by him to the board.

Q. During the entire eight months after the date of this mortgage do you remember whether you ever informed a single creditor of Brown, Bonnell and Company that such a mortgage as that had been executed and outstanding off the record?

A. I don't remember having had any conversation with regard to it with any one.

Q. Was it not understood—was it not a matter of conversation that the existence of this mortgage should not be disclosed until such time as the bonds were ready for absolute sale?

A. By whom do you mean?

Q. By the directors of the company.

A. No, sir; I don't think so. I think Mr. Mathews first suggested the question whether it would be necessary to record it, but whether he did it in a meeting of the board or to me afterwards
158 and whether others were present or not I don't know.

Q. It was a common understanding among the directors that it should not go upon the record, was it not?

A. I don't know that, sir.

Q. Well, you understood that it was not to go upon record?

A. The request was made that it should not go upon record, and

I assented to it so long as the bonds should remain in the hands of the trustees, so long as they should not be negotiated. There was no such understanding with me or with any one, so far as I know, that in case I should at any time, as trustee, think it necessary or proper to put the mortgage on record that I would not be authorized to do it.

Q. What you mean by negotiation is absolute negotiation for sale and not hypothecation?

A. Any use of the bonds that in their judgment would make it important that it should be put on record. The hypothecation of the bonds was understood to be a temporary measure to tide the company over an unforeseen and rather unusual contingency.

Q. You came to the conclusion, did you, to change that temporary measure into a permanent one when you received intelligence of the failure of John B. Ayer & Sons, of Chicago?

A. Yes, sir.

Q. How did the mortgage get to be recorded?

A. Mr. Caldwell recorded the mortgage. I don't know it from my own observation.

Objected to.

Q. I am asking you how that mortgage came to be recorded?

A. You want me to state how I obtained my information?

Q. Yes.

159 A. Mr. Caldwell, our cashier, told me that Mr. Ayer telegraphed him from Chicago immediately after his failure.

Q. Have you got a copy of that telegram or the original right here in the room now?

A. Yes, sir; I think so.

Q. I want it produced.

A. This, I think, is the original telegram.

Q. Read it.

Objected to.

A. "62 C. H., 15. Paid 20. Chicago 16, '83. Received at Cleveland, Ohio, February 17th, 1882.—Dan. P. Eells, president Commercial National Bank: I think you had better record mortgage on receipt of this. Will see you Monday. H. C. Ayer." It was received on the 17th of February, 1882.

Q. Well, what did Mr. Caldwell inform you he did on receipt of that dispatch?

A. He went down to Youngstown and took the mortgage and had it recorded. I think that Mr. Caldwell anticipated that dispatch and went on the day that it was sent. It was sent as a half-rate message. If the certificate is dated the 17th, he undoubtedly did. After learning of the failure of Mr. Ayer he probably took it immediately down there.

Q. It was received for record on the 17th, and this was a night message sent on the 16th?

A. Yes, sir.

Q. And he got it on the 17th, and then went down on that morning train, probably?

A. Yes, sir.

Q. Whose handwriting is that on the body of that telegram, is it Mr. Caldwell's?

160 A. I do not know. That don't look like his writing. It looks more like his son's writing.

Q. I presume it is a memorandum of some person that it never had been executed, as done? "Done."

A. Yes, sir; it looks like it.

Q. Where were you then?

A. On the Southern Pacific railroad between San Francisco and Los Angeles and Tucson.

Q. Do you know when Mr. Ayer, or J. B. Ayer and Sons, failed?

A. I don't know. It was about this time, the 17th or 18th of February, I think.

Q. You knew, did you not, that Brown, Bonnell and Company were carrying at that time or endorsers for J. B. Ayer's Sons for 5, 6, or 7 hundred thousand dollars?

A. That they had taken his paper for a large amount of iron.

Q. You knew, did you not, that the failure of the house of John B. Ayer's Sons would necessarily suspend Brown, Bonnell and Company, did you not?

A. When do you mean?

Q. In October and December.

A. I cannot say that the thing ever entered my mind, either to know it or not know it. Of course, if the company was carrying 5 or 6 hundred thousand dollars of anybody's paper and that party failed it would seriously impair their credit.

Q. You did know, did you not, all the time, from the time this mortgage was originally executed and clear down to the time it was recorded, that Brown, Bonnell and Company had negotiated a very large amount of paper of John B. Ayer's Sons with their endorsement?

A. Yes, sir.

Q. You did know, did you not, as a matter of business
161 inference from these facts, that the failure of John B. Ayer's Sons would inevitably bring about the failure of Brown, Bonnell and Company?

Objected to as being incompetent.

A. If it should occur—if you mean to ask me if I had any suspicion that it was going to fail, it did not come into my mind at all.

Q. You knew that you carried a large amount of their paper—several hundred thousand dollars—for iron sold?

A. Yes, sir; I did.

Q. Don't you know that there was an agreement or an understanding between the directors and Mr. Ayer that he was to notify you if any disaster should occur to him, so that the mortgage could then be put upon record, and was not that telegram sent in pursuance of that previous understanding which you had with him?

A. No, sir; it never was suggested that there was a possibility of his failure.

Q. I am not speaking about a possibility, but if any failure should occur?

A. No, sir; not a word or any understanding of that sort between us whatever.

Q. Mr. Eells, you have no other claim or title to these bonds, eighty thousand dollars of bonds which you claim the right to hold, except what you derived from the understanding that was arrived at at these two interviews which you have testified about occurring at the house of Mr. Stone and this order which is in evidence, have you?

A. I have a claim upon the bonds as having been hypothecated.

Q. But they are hypothecated by virtue of those conversa-
162 tions and this order I mean. Is there any other contract or agreement other than those two conversations at Mr. Stone's house and this order signed by Matthews under which you held those bonds? I am speaking of you as Mr. Eells and not as trustee. I am asking you whether you have any other claim or title to this eighty thousand dollars of bonds except what you have derived from these two arrangements, the agreement or understanding that you have given in evidence as occurring at the house of Mr. Stone in Cleveland and this order which has been introduced in evidence here signed by Mr. Matthews?

A. I hold the bonds by virtue of a hypothecation by me for the company, in pursuance of an understanding that I would endorse for the benefit of the company a certain amount of paper, provided they gave me those bonds.

Q. And you have indicated previously all the scope of that understanding?

A. I don't know that I had any other understanding with them.

Q. Is the same thing true in regard to all the other parties?

A. I don't know; I don't know of any other arrangement than I have detailed.

Q. I understand that $12,500, about, of this fifty thousand debt was paid before this company failed?

A. That is, the paper that was held by each of us except Mr. Otis was paid, and Mr. Otis' paper had not matured.

Q. So that — the arrangement as it now stands you claim to hold eighty thousand dollars of bonds to secure $37,500?

A. Yes, sir—that is, none of the bonds have ever been taken up.

Q. You claim to hold them as collateral, notwithstanding the payment of the $12,500?

A. Yes, sir; we have a right to hold them until it is all paid.

163 Q. I understand, at the time of the failure of Brown, Bonnell and Company, you had not up to that time paid a dollar in consequence of any of these endorsements?

A. None of the paper had matured except that which they had taken up.

Q. You had not paid anything?

A. No, sir.

Q. All the payments which you had made had accrued and been made since the failure of Brown, Bonnell and Company and the appointment of a receiver?

A. Yes, sir.

Q. And since the recording of the mortgage?

A. Yes, sir.

Redirect examination:

Q. From the time of the execution of the mortgage and down to after its recording what did you believe—what did you consider—the financial condition of Brown, Bonnell and Company and J. B. Ayer's Sons to be?

A. I regarded both concerns as perfectly solvent.

(Recross-question:)

Q. Mr. Eells, on the 17th day of February, 1883, Brown, Bonnell and Company was in a failing condition, was it not?

A. Well, I don't know that, sir.

Q. J. B. Ayer's Sons failed two days before?

A. No, sir; they were not in a failing condition until after J. B. Ayer's Sons failed.

Q. Well, they failed before that?

A. After the failure of J. B. Ayer's Sons the concern of Brown, Bonnell and Company, the corporation, was undoubtedly in a failing condition or else they would not have failed.

164 Q. Was not the failure of J. B. Ayer's Sons—was not it the inevitable result of circumstances existing between that house and the corporation to break Brown, Bonnell and Company and put them in a failing condition?

A. Yes, sir, I should think so.

Q. This mortgage, then, was recorded on the 17th of February, 1883, when Brown, Bonnell and Company were in a failing, in an insolvent condition, was it not?

A. Well, the company was in just such a condition as a large company doing an enormous business would be with the failure of a party whose paper they held to the amount of four or five hundred thousand dollars or more.

Q. Was it not unable then to pay its debts in due course of business?

A. Yes, sir.

Q. It was insolvent and made so by the failure of J. B. Ayer's Sons?

A. I suppose it was inevitable that the company would have to fail; yes, sir.

Redirect examination resumed:

Q. You stated that at the time of the recording of this mortgage you were in Arizona?

A. Yes, sir.

Q. Did you know at that time that John B. Ayer's Sons—that the

credit of John B. Ayer's Sons or Brown, Bonnell and Company was in any way impaired at the time of the recording of this mortgage?

A. No, sir.

Q. Did you know until after the recording of the mortgage that their credit was in any way affected?

165 A. No, sir.

Q. What did you consider the financial condition of them on the day of the recording of this mortgage?

A. I regarded them as perfectly good, both of them.

Q. Did you ever receive from Mr. Ayer or any one, before the recording of this mortgage, information that John B. Ayer's Sons or Brown, Bonnell and Company were liable to fail?

A. No, sir.

Q. At this meeting to which you have referred, at Mr. Stone's house in June, and subsequent meeting, were the officers of the company present?

A. Mr. Ayer was there and Mr. Matthews, and at one of the meetings I think Mr. Jones was there; I am not positive about him.

Q. Who executed and endorsed this commercial paper?

A. I think Mr. Matthews or Mr. Ayer; I think generally Mr. Matthews; I think Mr. Matthews was charged with the financial management of the company.

Q. And executed and endorsed commercial paper and made seals and did everything of that kind without consulting the board of directors?

A. Yes, sir.

Q. I understand you to say that at the subsequent meeting—the meeting of you gentlemen which occurred subsequent to June—the original arrangement made in reference to whether renewals of this paper should be made or not was modified. Is that correct?

A. It was agreed that the parties who had previously endorsed the paper of fifty thousand dollars, of which a part had been paid, that that paper should be re-endorsed to make it up to the original amount of fifty thousand dollars.

166 Q. If any subsequent arrangements for the renewal of that paper were made who were they made with?

A. By Mr. Matthews, the financial agent of the company.

Q. You have testified that the trustees did not sign upon the mortgage its acceptance?

A. Yes, sir.

Q. Did or did not the trustees actually receive and accept the trust and the mortgage and the bonds?

A. They did.

Q. But they omitted to sign on the mortgage?

A. Yes, sir. I would like to explain why they did not sign the mortgage.

Q. I don't think it is material; still there is no objection.

A. The mortgage was in the hands of the trustees all the time. After it came into their hands my attention was not called to the fact that it was necessary for the trustees to accept formally the trust on the mortgage, as they held the mortgage and the bonds.

Q. Your statements about this telegram and about Mr. Calwell's action under it and what he said to you are based on hearsay?

A. Yes, sir.

Q. Did you personally know at the time this telegram was received anything about it or about the recording of the mortgage or what Mr. Caldwell did?

A. No, sir.

Recross-examination:

Q. Had you left any instructions with Mr. Calwell to record that mortgage?

A. No, sir.

Q. Had he power to open your dispatches when you were gone?

167 A. My son had power to open them. I left it in charge of him at the bank.

Q. Now be kind enough to state whether or not that is not your son's endorsement there, that word "Done."

A. It is. It looks like his handwriting.

Q. He evidently opened this dispatch, did he not?

A. I suppose he did.

Q. In your absence, in the course of your business, your son had power to open your dispatches or attend to your business?

A. Yes, sir.

Q. And this endorsement, "Done," is in his handwriting?

A. It looks like it. I think it is his handwriting.

Q. Were you advised when you came back from California about what had been done with reference to this mortgage and its recording?

A. I think I was.

Q. Who advised you?

A. I cannot tell you that.

Q. When did you return from California?

A. My impression is that I got home about the 4th or 5th of March.

Q. Had you heard anything before that of the failure of Ayer or Brown, Bonnell and Company?

A. Yes, sir.

Q. Where?

A. On the cars between Los Angeles and Tucson. I saw the dispatch in the San Francisco papers.

Q. What date?

A. I believe it was Monday, but I am not sure about it.

Q. That was the first intelligence you had of the failure of the corporation and Ayer, was it?

A. Yes, sir.

168 Q. When you got back here who informed you with regard to the recording of this mortgage?

A. I could not tell you.

Q. Either your son or Mr. Caldwell?

A. I presume so. A good many people told me about it.

Q. A good many people did not tell you about the recording of the mortgage, did they?

A. Well, I don't know how I got the information; I found it out pretty quick, I know. I don't know who told me; I could not tell you that.

Q. So that your knowledge of affairs on the 17th of February, at the time this mortgage was recorded, was not anything about the affairs of Brown, Bonnell and Company, or that the mortgage was being recorded even, was it?

A. No, sir; I had no knowledge of it at the time.

Q. When did you go to California or to the West? When did you leave Cleveland?

A. I believe early in January.

Q. You were gone, then, all told, nearly two months?

A. Yes, sir.

Q. During that time you received no intelligence with regard to Brown, Bonnell and Company until you saw the notice of the failure on Monday?

A. Not that I remember.

Q. Did you, when informed of the recording of the mortgage during your absence—did you approve or disapprove what had been done?

A. Of the recording of the mortgage?

Q. Yes.

A. I approved of it.

169 Judge Day stated that he did not want to cross-examine now, but should like to reserve the opportunity to cross-examine if there is no objection on the part of anybody to reserve that privilege.

(The WITNESS:) I expect to go away next week.

(Judge DAY:) In case you shall return and after your return I may want to ask a few questions, but I would rather not cross-examine now, and the probability is that I shall not cross-examine at all, but I want to reserve the right to cross-examine in the case after consulting with my clients. It might be necessary.

Counsel make no objection.

("EXHIBIT L.")

$8,333.33. YOUNGSTOWN, O., *Oct.* 19, 1882.

On March 21, 1883, after date, we promise to pay to the order of Dan. P. Eells eighty-three hundred thirty-three $\frac{33}{100}$ dollars at Commercial Nat. Bank, Cleveland, O., value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

(Endorsed on back:) Dan. P. Eells. Brown, Bonnell & Co., by F. H. Matthews, tr.

170 ("EXHIBIT M.")

$8,333.33. CLEVELAND, O., *Nov.* 18, 1882.

Four months after date we promise to pay to the order of Dan. P. Eells eighty-three hundred & thirty-three $\frac{33}{100}$ dollars at Com. Nat. Bank, Cleveland, O., value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

(Endorsed on back:) Dan. P. Eells, p'r H. P. Eells. Brown, Bonnell & Co., by F. H. Matthews, tr.

("EXHIBIT N.")

$6,250. YOUNGSTOWN, *Dec.* 18, 1882.

April 18, —, after date, we promise to pay to the order of Dan. P. Eells sixty-two hundred & fifty dollars at Commercial Nat. Bank, Cleveland, O., value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

(Endorsed on back:) Dan. P. Eells, p'r H. P. Eells. Brown, Bonnell & Co., by F. H. Matthews, tr.

171 ("EXHIBIT O.")

$6,250. YOUNGSTOWN, *Dec.* 18, 1882.

May 22, —, after date, we promise to pay to the order of Dan. P. Eells sixty-two hundred & fifty dollars at Commercial Nat. Bank, Cleveland, O., value received.

No. —. Due ——.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

(Endorsed on back:) Dan. P. Eells, p'r H. P. Eells. Pay Am. Exchange Nat. B'k or order. Brown, Bonnell & Co., by F. H. Matthews, tr.

("EXHIBIT P.")

$8,333. YOUNGSTOWN, *Dec.* 24, 1883.

On Ap'l 23, 1883, after date, we promise to pay to the order of Dan. P. Eells eight hundred & thirty-three dollars at Com'l Nat. Bank, Cleveland, O., value received.

No. —. Due ——.

BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

Copy.

(Endorsed on back:) Dan. P. Eells. Brown, Bonnell & Co., by H. C. Ayer, p't.

172 (EXHIBIT A.)

YOUNGSTOWN, *April 3rd*, 1882.

Resolved, That this corporation issue and negotiate its coupon bonds in the aggregate sum of five hundred thousand dollars in the denomination of five thousand dollars each, bearing interest at six per cent. per annum, and that its president and secretary be hereby empowered and instructed to execute and deliver to Dan. P. Eells and John Hay, as trustees for the holders of said bonds, a mortgage in the words and figures hereinafter written, the form and terms of said bonds being set out in full in said mortgage, which next hereafter follows. And be it further resolved, That to further secure payment of said bonds and coupons the president of this corporation be authorized to assign to said Dan. P. Eells and John Hay as trustees 793 shares of the capital stock of the Mahoning Coal Company owned by this corporation, and in that behalf to execute an agreement with them in the words following, to wit:

This agreement, made this 3rd day of April, 1882, at Youngstown, Ohio, between Brown, Bonnell and Company, a corporation of the State of Ohio, of the first part, and Dan. P. Eells and John Hay, of the second part, witnesseth:

That whereas the said corporation has resolved to borrow money in the sum of five hundred thousand dollars ($500,000) and to issue therefor its bonds, payable to bearer, in the denomination of five thousand dollars each, the said bonds to be of the tenor named in the form thereof set out in a certain real estate mortgage of this date executed by said corporation to the parties of the second part herein to secure the payments of the said bonds, to which mortgage
173 reference is hereby made, such mortgage conveying to said parties of the second part as trustees all the real estate in the city of Youngstown, Ohio, known as the Brown, Bonnell and Company Iron Works;

And whereas for the further security of the payment of said bonds and all of them and of their interest coupons thereon the party of the first part has this day assigned to the parties of the second part as trustees seven hundred and ninety-three (793) shares of the capital stock of the Mahoning Coal Company, a mining corporation of said State, and has delivered to the parties of the second part, with the foregoing assignment endorsed thereon, the certificate issued by said mining corporation to the party of the first part for the said 793 shares:

Now, therefore, it is agreed between the parties aforesaid as follows, to wit:

1. That so long as the party of the first part shall not be in default in the payment according to their tenor of the aforesaid bonds and interest coupons or any of them all the said shares shall remain on the share transfer books of said mining corporation, standing in the

name of the party of the first part, with full power in it to vote the same at all meetings of said mining corporation the same as if said assignment in pledge had not been made, and so long — the party of the first part shall not be entitled to claim and have paid to it for its own use and benefit all dividends and profits and dividends of coal made by said mining company on account of said 793 shares, notwithstanding the property and assets of said mining company and the value of said shares be thereby impaired.

2. That in case of a sale of said shares on the trust herein
174 created the avails thereof, first deducting cost and a reasonable compensation to the parties of the second part, shall be applied to the payment of all of said bonds then remaining outstanding and unpaid without preference to any because of difference in time of maturity, but in such case all the matured interest coupons on all outstanding bonds shall be paid before payment of any part of the principal.

3. So soon as all of said bonds and interest coupons shall be paid the parties of the second part shall re-assign all said shares to the party of the first part.

In testimony whereof the party of the first part has caused its corporate name to be written hereunder by its president, and the parties of the second part have hereunder set their hands on the day first above written. Thus executed in duplicate.

(Signed) BROWN, BONNELL & CO.,
By H. C. AYER, *President.*
(Signed) DAN. P. EELLS.

There being no further business before the meeting, upon motion the same was adjourned.

(Signed) F. H. MATTHEWS.
H. C. AYER, *President.*
——— ———, *Sec'y P. T.*

175 YOUNGSTOWN, O., *Dec.* 29, 1882.

A meeting of the board of directors of Brown, Bonnell & Co., having been legally called, was this day held at the principal office in this city.

Present: Messrs. H. C. Ayer, D. P. Eells, W. H. Harris, C. A. Otis, F. H. Matthews, Jno. J. Williams, R. J. Wick, and A. W. Jones, Mr. H. C. Ayer presiding.

Mr. Ayer suggested that a committee be appointed to negotiate the bonds, amounting to $500,000, authorized by the board at their meeting April 3rd, 1882. After some discussion it was thought best to defer consideration of that matter until the annual meeting Jan. 16th, 1883.

There being no further business to consider, the meeting was therefore adjourned.

(Signed) H. C. AYER, *President.*
F. H. MATTHEWS, *Sec'y P. T.*

Copy of minutes of meeting held by Brown, Bonnell & Co. April 3rd and Dec. 29th, 1882.

176 SCHEDULE.

Statement of Judgments and Costs in Cases of Sundry Creditors vs. Brown, Bonnell & Co.

Date.	Judgment creditors.	Judgment.	Original cost.	Increase.
1883.				
November 22	Briar Hill Iron & Coal Co.	10,846 50	3 11	2 32
	Wick Bros. & Co.	28,386 63	4 07	2 48
	Geo. D. Wick	14,774 30	3 67	2 48
	Andrews Hitchcock	21,903 00	3 83	2 48
	First National Bank, Youngstown, Ohio	51,388 00	5 91	2 48
	Second National Bank, Youngstown, Ohio	12,796 93	3 75	2 32
	Henry Wick & Co.	11,446 00	3 27	2 48
	Grange Savings & Loan Asso.	11,885 00	3 27	2 48
	Hubbard National Bank	11,663 63	3 19	2 48
	Foster Coal Co.	2,600 00	2 95	2 48
	Chas. S. Worden	17,383 77	3 91	2 48
	W. R. Everett	17,699 00	3 59	2 48
	Lorenzo Lane	5,835 00	2 95	2 48
	Leadville Coal Co.	11,974 45	3 47	2 48
	John J. Williams	18,457 08	3 03	2 48
	Greenville National Bank	9,965 60	3 27	2 32
	Farmers' & Mechanics' National Bank	10,418 24	3 27	2 48
	First National Bank of Mercer, Pa.	5,706 00	2 95	2 32
	Pittsburgh National Bank of Com.	11,237 32	3 27	2 48
	Shenango Coal Co.	19,721 83	4 29	2 48
	Westerman, Files & Co.	1,473 37	3 03	2 48
	Sharon National Bank	105,006 84	7 11	2 32
177	A. & W. Powers	649 32	3 03	2 48
	Gerard Savings Bank	15,904 40	3 51	2 48
	Farmers' D. & S. Bank, Poland	5,783 18	2 95	2 48
	Florence Mining Co.	59,578 75	5 91	2 48
	Carbon Limestone Co.	1,190 70	3 19	2 48
	Imperial Coal Co.	7,456 32	3 59	2 48
	Witch Hazel Mining Co.	1,089 82	3 59	2 48
	Dexter B. Chambers	988 13	2 95	2 48
	Himrod Furnace Co.	14,080 65	3 51	2 48
	Merchants' National Bank	34,017 41	4 71	2 48
	L. C. Jones	17,499 44	3 75	2 48
	Total on judgments of Nov. 22nd	570,806 61	121 95	81 04

Schedule—Continued.

178 Date.	Judgment creditors.	Judgment.	Original cost.	Increase.
1883.				
Dec. 10	P. Jacobs & Sons	4,720 00	3 35	
	Sidney Strong	152 00	2 95	
	David Jones	1,108 00	2 95	
	J. H. Outhwaite & Co.	983 00	3 03	
	Hiram Park	5,735 00	3 03	
	First National Bank, Mercer, Pa.	5,330 60	3 19	
	Reid Bros.	5,972 00	3 03	
	National Bank of W. Va.	5,640 00	3 59	
	First National Bank of Bellaire	5,830 00	3 27	
	Park & Westlake	262 74	2 87	
	Lang & Davidson	1,266 50	3 03	
	John A. Vinlon	580 00	3 19	
	American Exchange Nat. Bank	11,137 36	3 59	
	John A. Boyle	530 65	3 11	
	Allegheny Coal Co.	157 70	3 19	
	E. Bell & Sons	1,194 30	3 19	
	Harman Austin	5,997 00	3 19	
	National Bank Fenyette Co.	75,320 00	5 83	
	P. & L. E. R. R. Co.	10,438 00	3 20	2 48
Dec. 15	Martin Quigley	3,485 90	2 95	
	Arthur Conway	1,627 22	2 95	
	Total judgments of Dec. 10 and 15	$147,467 79	68 60	2 48
	Total judgments Nov. 22nd brought over	570,806 61	121 95	81 04
		718,274 40	190 55	83 52

179 No. 1.

CLEVELAND, *Sept.* 23, 1882.

D. P. Fells, trustee:

Please deliver to the Commercial Nat. Bank thirty bonds of $5,000 each of this company from the amount now remaining in your hands, to be by them held as collateral security for all loans made by them or for their benefit by said bank.

Yours truly,

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Treas'r.*

(Written across the face.)

Received thirty bonds of $5,000 each on this order Sept. 23, 1882, Nos. 71 to 100, inclusive.

(Signed) J. COLWELL, *Cas'r.*

No. 2.

CLEVELAND, O., *June* 19, 1882.

Dan. P. Eells, trustee:

DEAR SIR: Please deliver to Mr. Amasa Stone ($100,000) one hundred thousand dollars of our bonds now in your hands as security for his endorsement of $50,000 of our paper.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Treas.*

180 (Written on the face.)

Rec'd from D. P. Eells, trustee, on this order twenty bonds of $5,000 each, Nos. 41 to 60, inclusive, in full par value one hundred thousand dollars.

Cleveland, June 30, 1882.

(Signed) A. STONE.

Four of the above-named bonds given to Chas. A. Otis by order of F. H. Matthews, V. p't., and H. C. Ayer, pres't.

Dec. 5, 1882.

(Signed) D. P. EELLS.

No. 3.

CLEVELAND, *June* 19, 1882.

Dan. P. Eells, trustee:

Please deliver to W. H. Harris & Dan. P. Eells each twenty bonds of $5,000 each of Brown, Bonnell & Co., in your hands, to be by them held as collateral security for the payment of the notes of Brown, Bonnell & Co., amounting to $50,000, endorsed by W. H. Harris, and $50,000 endorsed by Dan. P. Eells, and all renewals or partial renewals of the same, said endorsements being for the use and benefit of Brown, Bonnell & Co.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *T'r.*

(Written across the back.)

Rec'd bonds as written, to wit, twenty bonds of $5,000 each for D. P. Eells and twenty bonds of $5,000 each for W. H. Harris.

June 19, 1882.

(Signed) DAN. P. EELLS,
For Himself and W. H. Harris.

181 (Written across the face.)

Permission is given, Dec. 11, 1882, to deliver of these bonds eight bonds (four by W. H. Harris and four by D. P. Eells) to Chas. A. Otis, to be by him held as collateral for endorsement for our paper, as per order given him this day by D. P. Eells, trustee.

(Signed) BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

No. 4.

CLEVELAND, O., *Dec.* 11, 1882.

D. P. Eells, trustee:

Please deliver to Chas. A. Otis four bonds of $5,000 each, in all $20,000, which, with four bonds each to be delivered him from those now held by A. Stone, D. P. Eells, and W. H. Harris, make sixteen bonds of Brown, Bonnell & Co. ($80,000) to be by him held as collateral security for the payment of $50,000 of the notes of Brown, Bonnell & Co., endorsed by him for our use and benefit, and for any renewals or partial renewals of the same.

(Signed) BROWN, BONNELL & CO.
By F. H. MATTHRES, *Treas.*

(Written on the face.)

Rec'd Dec. 11, 1882, four bonds from Dan. P. Eells, trustee, A. Stone, W. H. Harris, and D. P. Eells, in all sixteen bonds, of $5,000 each, or $80,000 par value, to be by me held as collateral security, as stated in this order.

(Signed) CHAS. A. OTIS.

182 "*Mortgage Deeds.*" *Brown, Bonnell & Co. to Dan. P. Eells et al., Trustees.*

This indenture, made this 3rd day of April, A. D. one thousand eight hundred and eighty-two, by and between Brown, Bonnell & Co., a corporation organized and existing under the laws of the State of Ohio, party of the first part, and Dan. P. Eells and John Hay, of Cleveland, Ohio, parties of the second part, witnesses:

That whereas the party of the first part, being thereto empowered by law, has, by due action taken, resolved to borrow money—in the aggregate five hundred thousand dollars—and to issue therefor its bonds bearing even date herewith, one hundred in number, in the denomination of five thousand dollars each, all of like tenor except as to the time of their maturity, of which bonds six are payable in two years, seven in three years, eight in four years, nine in five years, ten in six years, twelve in seven years, fourteen in eight years, sixteen in nine years, and eighteen in ten years, from the date thereof, the bonds to be duly executed under the seal of the party of the first part by the president and treasurer thereof, and the interest coupons to be authenticated by the lithograph fac-simile of the signature of said treasurer, and the bonds also the [to] bear the certificate of the parties of the second part, each of which bonds, with the coupons attached, shall, except as to the time of maturity, be of the tenor and effect following—that is to say:

183 UNITED STATES OF AMERICA,

No. —. *State of Ohio.* $5,000.

Brown, Bonnell & Company, a corporation organized and exist-

ing under the laws of Ohio, acknowledges itself indebted unto Dan. P. Eells and John Hay or bearer in the sum of five thousand dollars, and promise to pay the same on the third day of April, A. D. one thousand eight hundred and — (18–), at the Commercial National Bank, in the city of Cleveland, Ohio, and to pay interest thereon from and after the third day of April, 1882, at the rate of six per cent. per annum, semi-annually, on the third days of October and April in each year, at said bank, upon presentation and surrender of the interest warrants hereto attached as they respectively become payable. This bond is one of a series of one hundred bonds, numbered consecutively from number one to number one hundred, inclusive, all of like date and amount and of the same tenor, except as to the time of their maturity, of which series six bonds, numbered consecutively from number one to number six, inclusive, are payable on the third day of April, 1884; seven bonds, numbered consecutively from number seven to number thirteen, inclusive, are payable on the third day of April, 1885; eight bonds, numbered consecutively from number fourteen to number twenty-one, inclusive, are payable on the third day of April, 1886; nine bonds, numbered consecutively from number twenty-two to number thirty-six, are payable on the third day of April, 1887; ten bonds, numbered consecutively from number thirty to number forty, inclusive, are payable on the third day of April, 1888; twelve bonds, numbered
184 consecutively from number forty-one to number fifty-two, inclusive, are payable on the third day of April, 1889; fourteen bonds, numbered consecutively from number fifty-three to number sixty-six, inclusive, are payable on the third day of April, 1890; sixteen bonds, numbered consecutively from number sixty-seven to number eighty-two, inclusive, are payable on the 3rd day of April, 1891, and eighteen bonds, numbered consecutively from number eighty-three to number one hundred, inclusive, are payable on the third day of April, 1892. The payment of the principal and interest of all of said bonds is secured by a deed in the nature of a mortgage, bearing even date herewith, made by said corporation to said Dan. P. Eells and John Hay, trustees, conveying to them, in trust for the security of the successive holders of all said bonds, all the real estate of said corporation situate in the city of Youngstown, county of Mahoning, and State of Ohio, consisting of about forty-five acres of land, with the two blast-furnaces, six iron rolling mills, and other buildings, improvements, fixed machinery, and other fixtures thereon, and of all the interest of said corporation in what is known as the Struthers Furnace, blast-furnace, property, comprising about 32 acres, in the the township of Poland, in said county, and is further secured by a pledge in writing to said Dan. P. Eells and John Hay, upon the trust aforesaid, of 793 shares of the capital stock of the Mahoning Coal Company, a mining corporation of the said State of Ohio, to which mortgage and pledge reference is hereby made, and upon the certificate of said trustee hereon endorsed, this bond will become secured by the said mortgage and by said pledge of shares.

In testimony whereof the said corporation, Brown, Bonnell
185 & Company, has caused its corporate seal to be hereto affixed and this bond to be subscribed by its president and treasurer and the accompanying interest warrants to be authenticated by the lithograph fac-simile of the signature of said treasurer on this 3rd day of April, A. D. 1882.

[SEAL.] —— ——, *Treasurer.* —— ——, *President.*

(*Trustee Certificate.*)

We hereby certify that the within bond is issued under and by virtue of the deed in the nature of a mortgage, therein named, and that the payment of the principal and interest of said bond is secured by said mortgage and by the pledge of shares therein named.

Coupon.

$150. On the third day of October, 1882, Brown, Bonnell & Company will pay to the bearer, at the Commercial National Bank, in the city of Cleveland, Ohio, one hundred and fifty dollars, being the semi-annual interest that day due on its bond No. —.

F. H. MATTHEWS, *Treasurer.*

And whereas, for the purpose of securing the payment of said bonds and the interest thereon, the party of the first part is by law authorized and has, by due action taken, determined to make this deed in the nature of a mortgage, and directed its president and secretary to execute and deliver said deed to the parties of the second part, as trustees:

Now, therefore, in order to secure the payment of said donds and the interest coupons thereto attached and the performance on its part of its covenants in this indenture contained, and in con-
186 sideration of one dollar to it paid by the parties of the second part, the receipt whereof is hereby acknowledged, the party of the first part does hereby grant, bargain, sell, alien, convey, and confirm unto the parties of the second part and the survivors of them and unto his heirs and assigns forever all of the following twenty-nine parcels of land—

Situate in the city of Youngstown, county of Mahoning and State of Ohio, and all and singular the two blast-furnaces, the six rolling mills, and all the other buildings, structures, improvements, fixed machinery, and other fixtures thereon, of which parcels of land the 1st parcel is part of lot No. 10, in the east division of outlots in the original town plot of Youngstown, and is bounded as follows: Beginning at a post on the east line of the highway to Gibson's fording and 15 feet feet from common water-mark in the Pennsylvania and Ohio canal, running thence south on the east line of said road 16 rods, thence east 10 rods, thence north 16 rods, thence west on the bank of said canal 15 feet from common water-mark 10 rods to the place of beginning, containing one acre of land.

The 2nd parcel is also a part of said outlot No. 10, and is

bounded as follows: Beginning at the northeast corner of the 1st parcel 15 feet from the top water-line of the said canal, running thence south 18 rods and 23 links to the Mahoning river, thence easterly on the north bank of said river 18 rods and 12 links to a post near the outlet of a ditch, thence north parallel with the east line of the 1st parcel 16 rods and 21 links to the bank of said canal, and thence on the bank of said canal N. 86½° W. 18 rods to the place of beginning, containing about 2 acres and 17 perches.

187 The 3rd parcel is bounded as follows: Beginning at low-water mark, on the north bank of the Mahoning river and on the east line of said 2nd parcel, on which stands the Falcon Furnace, running thence north on said east line of the second parcel to a stake 15 feet from the water in said canal; thence eastwardly along the bank of said canal, keeping 15 feet from the water therein, to a point such that if a line was drawn from it southerly parallel with the first-named boundary line of this parcel so as to meet a line drawn eastwardly along the bank of said river from the place of beginning there would be contained within said four boundary lines one acre of ground; the said parcel has for its boundary lines the said four described lines.

The 4th parcel is known as part of lot No. 1, in the original survey of the south division of outlots in the town plat of Youngstown, and is bounded on the northerly side by the outer line of the towing-path of said canal, on the easterly side by the highway or street leading to the Mahoning bridge, on the southerly side by the Mahoning river, and on the westerly side by the west line of said lot No. 1, which is also the east line of lands formerly owned by the late William Rayer, deceased.

The 5th parcel is bounded as follows: Beginning at the northwest corner of a lot known as the Phœnix Furnace lot, and at a point 15 feet south of the common water-mark in said canal, thence running S. 29¼° W. 8 chains and 35 links to low-water mark on the N. bank of the Mahoning river; thence north 82¾° N. 6 chains 7½ links; thence north 29¼° E. 3 chains 30½ links; thence N. 60¾° W. 1 chain 89½ links; thence N. 29¼° E. 5 chains 30 links to an iron stake 15 feet south of the top water-line of said canal; thence S. 73° E. 1 chain 72 links; thence S. 76¾° E. 6 chains 4 links to the place of

188 beginning, containing about 5.924 acres.

The 6th parcel is bounded and described as follows: Beginning at a point on the north line of the right of way and lands formerly belonging to the Pennsylvania and Ohio Canal Company where said line is met by the west line of the east half of lot No. 23 of Bane and Wick's subdivision of a part of the south division of outlots in the town plat of Youngstown, thence running northerly along said west line to the south line of the north half of said lot No. 33; thence westerly along said south line and parallel with Bane street to the west line of said lot 33; thence northerly along said west line of said lot 30 feet; thence easterly parallel with Bane street to the west line of the east half of said lot; thence northerly along said west line of said east half of said lot 12 feet; thence easterly parallel with Bane street to the east line of said lot 33; thence northerly along

said east line of said lot to the south line of Bane street; thence easterly along the south line of Bane street to a point where said south line of Bane street would be met by the production southerly of the east line of Walnot street; thence northerly along the southerly production of said east line and along the east line of Walnot street to the northwest corner of lot No. 21 of said Bane and Wick's subdivision; thence easterly parallel with Bane street to the northeast corner of lot No. 16 of Baine & Wick's said subdivision; thence easterly along the south line of an alley to the west line of Presque Isle street; thence southerly along said west line last named to the north line of the right of way and lands formerly belonging to said canal company, and thence westerly along said north line of said right of way and lands last named to the place of beginning.

The 7th parcel is a part of lot No. 252 of the latest numbering of lots in said city, and is bounded as follows: Beginning
189 at the southeast corner of said lot, thence running northerly along the east line thereof 18 feet; thence by a southwesterly course to a point on the south line of said lot distant westerly 45½ feet from the southeast corner of said lot; thence easterly along the south line of said lot 45½ feet to the place of beginning.

The 8th parcel is bounded as follows: Beginning at a point on the east line of Presque Isle street S. 2½° W. 26 links from the southwest corner of a lot conveyed to Brown, Bonnell & Co. by C. H. Andrews *et al.* by a deed which is recorded in the records of said county in vol. 20, at page 84 *et seq.*, thence running S. 2½° W. along said east line of said street 20 feet; thence 81½° E. 1 chain and 52 links; thence 4° E. 20 feet; thence N. 81½° W. 1 chain 53 links to the place of beginning.

The 9th parcel is that part of lot No. 33 which was conveyed to Andrews & Hitchcock 2 July, 1860, by David Todd, and is bounded as follows: Beginning at a stake on the line between said lot and lot 32 1 chain and 68 links S. 29½° W. from the south line of Front street, thence running S. 29½° W. 95 links to the canal; thence up said canal 49 links; thence N. 4° E. 1 chain 50 links; thence S. 82¼° E. 31 links; thence S. 87¾° E. 58 links to the place of beginning.

The 10th parcel is that part of outlot No. 32 of the southeast division of outlots in the former village of Youngstown which, on the 12th September, 1859, was conveyed by J. Warner to Andrews & Hitchcock, and is bounded as follows: Beginning at a stake where the west line of said lot 32 meets the berme bank of said canal,
190 running thence N. 29½° E. 95 links; thence S. 85° E. 1 chain 23 links; thence S. 28½° W. 80 links; thence S. 89° W. 1 chain 30 links to the place of beginning.

The 11th parcel is the south part of city lot No. 281 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presque Isle street S. 2½° W. 2 chains 78¼ links from the southeast corner of Front street and Presque Isle streets, thence running along the east line of Presque Isle street S. 2½° W. 26 links; thence S. 79¾° E. 1 chain 53 links; thence

N. 4° E. 21 links; thence N. 77° W. 1 chain 55 links to the place of beginning.

The 12th parcel is known as city lot No. 280 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presque Isle street S. 2½° W. 20 feet from the southwest corner of said lot 281, thence running along the east line of said street S. 2½° W. 65½ links to said canal; thence along the north side of high water in said canal S. 83½° E. 1 chain 50 links; thence N. 4° E. 51⅛ links; thence N. 79⅔° W. 1 chain 52 links to the place of beginning.

The 13th parcel is all the land which was conveyed on the 5th December, 1863, by William Lindsey *et ux.* to the firm of Brown, Bonnell & Co. by a deed which is recorded in said records in vol. 28, at page 233 *et seq.*, which deed is here referred to.

The 14th parcel is all the land ever owned or occupied by the Pennsylvania and Ohio Canal Company which lies between the center of Crab creek on the east and the east side of what is known as Rany's mill on the west, including between said east and west boundaries all of the land ever occupied by berme bank, water channel, and towing-path of said canal.

191 The fifteenth parcel comprises all the lands conveyed to the firm of Brown, Bonnell & Co. by Henry Manning on the 26th November, 1863, by a deed recorded in said records, in vol. 19, at page 711, except such part of said lands as lie in the fourteenth parcel and including all such rights as were conveyed by said Henry Manning in his said deed, which is here referred to.

The fifteen parcels above named were conveyed on the 9th day of October, 1875, by Joseph H. Brown *et al.* to the party of the first part by a deed which is recorded in the records of said county in vol. 38, at page 606 *et seq.*, and is here referred to.

The sixteenth parcel is the west half of the south half of lot No. 33, in Bane and Wick's said subdivision, and also all of lot No. 32, in said subdivision, except such part of said lot No. 32 as was sold by Almon Raney and wife and Bostwick Raney to Ellen Ferrall, and except also such part of said lot 32 as was conveyed by said Almon Raney and wife and Bostwick Raney to Ann McGraw by a deed which is recorded in the records of said county in vol. 19, at page 493. Said sixteenth parcel was conveyed to said corporation 9th October, 1879, by H. O. Bonnell *et ux.* by a deed recorded in said records in vol. 45, at page 352.

The seventeenth parcel is the north half of the west half of lot No. 33 of said Bane and Wick's subdivision, excepting so much thereof as was conveyed away by George A. Young prior to March, 1880. The part above conveyed of said north half was conveyed to said corporation by A. W. Jones *et ux.* 24th April, 1880, by a deed recorded in said records in vol. 47, at page 384, and this seventeenth parcel shall contain as a part thereof all the interest conveyed by said Jones in said deed to said corporation in any other part

192 of said lot 33 of said subdivision.

The eighteenth parcel contains all that part of lot 275 of the latest enumeration in said city which was conveyed to said cor-

poration by Mary Degen *et al.* 24th November, 1880, by a deed which is recorded in said records in vol. 48, at page 98.

The nineteenth parcel is city lot No. 574 of the latest enumeration in said city, and was conveyed to said corporation 3rd January, 1881, by John Rigney *et ux.* by deed recorded in the records of said county in vol. 45, at page 583.

The twentieth parcel is lot No. 572 of the latest enumeration in said city, and was conveyed 8th February, 1881, to said corporation by Bryan Kennedy *et al.* by a deed recorded in said records in vol. 49, at page 14.

The twenty-first parcel is lot No. 571 of the latest enumeration in said city, and was conveyed 22nd February, 1881, to said corporation by E. M. Wilson, administrator of Patrick Corrigan, by a deed recorded in the said records in vol. 48, at page 291.

The twenty-second parcel is the east half of lot No. 580 of the latest enumeration in said city, and was conveyed to said corporation 19th March, 1881, by Christian Ludt *et al.* by a deed recorded in said records in vol. 49, at page 93.

The twenty-third parcel is the northwest part of original lot No. 11, as shown by plat of village lots of Youngstown made by Dr. Henry Manning and recorded in Mahoning County Records of Plats, vol. 1, page 51, bounded as follows: Commencing at the northwest corner of said lot No. 11, thence N. 74½ degrees E. 1 chain to lot owned by M. Fee and now known as city lot 582, new num-
193 bers; thence south two chains 71½ links; thence west 98 links to the east line of original lot No. 12; thence N. ½ degree E. 2 chains 44½ links to the place of beginning, containing about one-fourth of an acre of land, and was conveyed 1st July, 1881, to said corporation by Thomas George *et ux.* by a deed recorded in said records in vol. 49, at page 393.

The twenty-fourth parcel is the west half of lot No. 580 of the latest enumeration in said city, and is the same land which was conveyed to said corporation 1st July, 1881, by Catharine Scanlon *et al.* by a deed recorded in said records, in vol. 49, at page 392.

The twenty-fifth parcel is part of a larger parcel of ground conveyed to John Stambaugh, trustee, by W. S. Parmelee, trustee, 31st July, 1871, by a deed recorded in said records, in Deed Book 31, at page 273 *et seq.*, and is bounded and described as follows: Beginning on the east line of said larger parcel at the middle of a stone monument standing at the northeast corner of a piece of ground conveyed by the Liberty & Vienna Railroad Company to the Ashtabula, Youngstown & Pittsburgh Railroad Company by a deed dated 25th August, 1871, and recorded in said records, in vol. 33, at page 463 *et seq.*, thence, running along the east line of said larger parcel conveyed as aforesaid by W. S. Parmelee, trustee, N. 30 degrees 28 minutes east about 398.7 feet to a stone monument at a point 15 feet southerly from the line of high-water mark on the south side of the Pennsylvania & Ohio canal; thence, along a line parallel with and distant fifteen feet southerly from the said line of high-water mark on the south side of said canal, N. 49 degrees 44 min-
194 utes W. about 135¾ feet to a point which, measured along a

line perpendicular to the east line of Market street, is distant easterly 150 feet from the east line of Market street; thence, along a line parallel with and distant 150 feet easterly from the east line of Market street, S. 31 degrees 20 minutes W. about 421.2 — to the north line of said ground conveyed as aforesaid to the Ashtabula, Youngstown & Pittsburgh Railroad Company, and thence, along the said north line of land conveyed to said railroad company, S. 59 degrees 2 minutes E. about 139.7 feet to the beginning, containing 1 acre and .28388 of an acre of land, and is the same land conveyed to said corporation by John Stambaugh, trustee, *et al.* 14th July, 1881, by a deed recorded in said records, in vol. 50, at page 66 *et seq.*

The twenty-sixth parcel is the east end of outlot No. 2, in said city, contains about 3 & $\frac{2}{1000}$ of an acre of land, and is the same land conveyed to said corporation 30th July, 1881, by Edwin Bell *et al.* by a deed recorded in said records, in vol. 50, at page 63 *et seq.*, which deed is here referred to for a more particular description of said last-named parcel.

The twenty-seventh parcel is lot No. 576 of the latest enumeration in said city, and was conveyed to said corporation 16th November, 1881, by Mary Kelley by a deed recorded in said records, in vol. 51, at page 34.

The twenty-eighth parcel is the east part of lot No. 575 of the latest enumeration in said city, and is bounded as follows: Beginning at the northwest corner of lot No. 574, on the south line of the Pennsylvania and Ohio canal, thence in a westerly course, parallel with the south line of said lot No. 575, 25 feet; thence south, parallel with the west line of lot No. 574, to the north line of lot No. 573; thence east along the north line of said lot No. 573 25 feet to the southwest corner of lot No. 574, and thence north along the west line of lot No. 574 to the place of beginning, and was conveyed to said corporation 25th November, 1881, by Mary Joice *et al.* by a deed recorded in said records in vol. 51, at page 63.

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The twenty-ninth parcel is the west part of lot No. 575 of the latest enumeration in said city, situated on the south side of the Pennsylvania and Ohio Canal, bounded on the north by the towing-path of said canal, on the east by the east part of said lot No. 575, which said east part was conveyed by Charles Gillen to Mary Kelley; on the south by lots 573 and 577, and on the west by lot 576, and was conveyed to said corporation 2nd December, 1881, by Michael Connors *et ux.* by a deed recorded in said records in vol. 51, at page 90.

Also all the right, title, and interest of the party of the first part in and to that lot of land on the northeast corner of Bayne and Champion streets, in the city of Youngstown, on which stands the new brick office recently erected by it.

Also all the other lands and rights in lands in said city of Youngstown owned by said party of the first part as a part of its iron manufacturing works therein, saving the reservations and exceptions hereinafter written.

Also all the right, title, and interest of the party of the first part in and to those two certain parcels of ground in the township of

Poland, in said county, one of about $29\frac{49}{100}$ acres and one of about $2\frac{3}{100}$ acres, known as the Struthers Furnace property, lately purchased by contract by the party of the first part from Thomas
196 Struthers *et al.*, and now in its possession, and in the blast-furnace, and in all buildings, structures, fixed machinery, and other fixtures thereon, saving and reserving, nevertheless, out of and from the above conveyance all that part of the twenty-nine parcels first above named which was conveyed by the party of the first part to the N. Y., P. & O. Railroad Company as a right of way for its railroad and all the part of the residue of said twenty-nine parcels which lies north of the land so conveyed to said railroad company, and also reserving and excepting all the right in and parts of all the said first-named twenty-nine parcels of land which were reserved and excepted to the respective grantors in all of the deeds to the party of the first part above named; and this conveyance is made subject to the stipulations in all said deeds contained; to have and to hold all and singular the premises aforesaid, but subject to the reservations above named, unto the said parties of the second part as joint tenants, and not as tenants in common, and to the survivor of them and to his heirs and assigns forever, but nevertheless in trust to secure the payment according to their tenor and to the successive owners and holders thereof of each of said bonds and of each of said interest coupons thereto attached, and upon the further trusts and conditions following and subject to the powers and agreements hereinafter named; and it is expressly covenanted and agreed between the parties to this indenture as follows—that is to say:

First. That the said bonds shall be certified by the parties of the second part according to the form of certificate above named, and until so certified shall not become secured hereby; that until default shall be made by the party of the first part in the payment, pursuant to the terms thereof, of the principal or interest of any of
197 said bonds, and so long as the party of the first part shall well and truly perform all its covenants contained in said bonds and in this indenture, it shall remain in the quiet and peaceable possession, use, enjoyment, and control of all the property hereinbefore conveyed, and that if it shall well and truly pay, according to the tenor thereof, each and every one of said bonds, with all the interest thereon, and if it shall also at all times keep and perform all its other covenants and agreements herein contained, or if, in case of default by it in the performance of any of its other covenants and agreements, it shall, within thirty days after receiving notice thereof, either from the parties of the second part or their survivor or their successors in the trust, fully repair such default, then this indenture and all the rights, title, and estate hereinbefore conveyed shall become and remain void and of no effect, but otherwise be in full force and virtue.

Second. That so soon as the party of the first part shall, in accordance with the terms of its contract with said Struthers and others, become seized of the legal title of said Struthers Furnace property, it will, upon the request of the parties of the second part

or the survivor, convey the same to them upon the same trusts herein contained.

Third. That the party of the first part will, so long as any of said bonds or the interest thereon may be outstanding and unpaid, keep all of the said conveyed property in good and reasonable repair and condition, will cause all taxes thereon to be promptly paid, and will neither do nor suffer to be done any act whereby the lien hereby created shall be impaired, subject, however, to its rights hereinbefore reserved to use and employ said property in the ordinary
198 manner; and it further hereby agrees to pay all of said bonds and the interest warrants attached according to their true tenor.

Fourth. That while any of said bonds or interest remain unpaid the party of the first part will keep insured in good and responsible companies against loss or damage by fire all such of the inflammable part of the property conveyed as shall be reasonably insurable in an aggregate sum not less than two hundred thousand dollars, if so much insurance can be obtained, such insurance to be made and kept payable to the parties of the second part as trustees herein; but the money received by the trustees in case of loss or damage by fire on account of such insurance shall, upon the request of the party of the first part, be applied by the parties of the second part to the repairing, replacing, or rebuilding, under the joint direction and control of both parties, the property so damaged or destroyed.

Fifth. That the lien hereby created shall not in anywise be lessened or impaired by reason of the additional security for the payment of said bonds as named in said bonds.

Sixth. That in case of a foreclosure of the lien hereby created the avails of the property sold, first deducting costs and a reasonable compensation to be paid to the parties of the second part herein, shall be applied to the payment of all said bonds then remaining outstanding and unpaid without preference to any because of difference in the time of maturity, but in such case all the matured interest coupons on all outstanding bonds shall be paid before payment of any part of the principal.

Seventh. And the party of the first part further covenants and agrees that it has hitherto never executed any mortgage
199 or other conveyance creating any lien or incumbrance on any of the above-conveyed lands.

In testimony whereof the party of the first part has caused its corporate seal to be hereto affixed and these presents to be subscribed by its president and secretary, and the parties of the second part, in token of their acceptance of the trusts hereby created, have hereto set their hands and seals on the day first above written.

HERBERT C. AYER, *President.* [SEAL.]
A. W. JONES, *Secretary.* [SEAL.]

[Corporate Seal.]

Signed, sealed, acknowledged, and delivered in the presence of—
F. H. MATTHEWS,
S. B. GOODALE,
As to H. C. Ayer.
SIDNEY STRONG,
WILLIAM R. MERRICK,
As to A. W. Jones.

THE STATE OF NEW YORK, } ss:
County of New York, City of New York, }

Before me, a commissioner of deeds for the State of Ohio, residing in said city and county, duly commissioned, personally came Herbert C. Ayer, president of the corporation Brown, Bonnell & Company, and acknowledged that as president of said corporation he subscribed the foregoing indenture, and that his execution thereof and the affixing of the common seal of the corporation thereto was done by direction of a resolution of the board of directors, and that the foregoing indenture was his free act and deed as such president and the free act and deed of the said corporation.

200 Witness my hand and official seal on this 16th day of June, A. D. 1882.

[COMMISSIONER'S SEAL.] S. B. GOODALE,
Commissioner for Ohio, Resident in New York City.

THE STATE OF OHIO, } ss:
Mahoning County, }

Before me, a notary public within and for said county, personally came A. W. Jones, secretary of the corporation Brown, Bonnell & Company, and acknowledged as such officer he subscribed his name to the foregoing indenture and affixed thereto the common seal of said corporation, and that the same was his free act and deed as such officer and the free act and deed of said corporation; and, being sworn, he says that what purports to be the common seal of said corporation, hereto affixed, is the genuine corporate seal thereof and was affixed to said indenture by him by order of the board of directors of said corporation.

Witness my hand and seal notarial on this 14th day of June, A. D. 1882.

WILLIAM R. MERRICK,
[NOTARIAL SEAL.] *Notary Public.*

Received February 17th, 1883, at 2.35 o'clock p. m. Recorded February 19th, 1883.

THOMAS H. WARD, *Recorder.*

THE STATE OF OHIO, } ss:
Mahoning County, }

YOUNGSTOWN, OHIO, *April 5th*, 1883.

[Recorder's Seal.] I, Thomas H. Ward, recorder of said Mahoning county, Ohio, in whose custody and keeping

201 the files and records of said office are required by law to be kept, do hereby certify that the above and foregoing is a full, true, and correct copy of the within mortgage deed as recorded in said County Records of Mortgages in volume 21, at pages 265, 266, 267, 268, 269, 270, 271, 272, 273, and 274.

As witness my hand and official seal, at said Youngstown, in said county and State, this 5th day of April, A. D. 1883.

THOMAS H. WARD, *Recorder.*

COMMERCIAL NATIONAL BANK,
CLEVELAND, O., *Dec.* 23, 1884.

Bonds of Brown, Bonnell & Co. Owned by the Commercial Nat'l Bank of Cleveland, O.

Nos. 71 to 100, inclusive, $5,000 each; total $150,000
Collateral to claim No. 90.

Bonds owned by Dan. P. Eells:
Nos. 1 to 16, inclusive, $5,000 each; total $80,000
Collateral to claim No. 95.

Bonds owned by W. H. Harris:
Nos. 17 to 32, inclusive, $5,000 each; total $80,000
Collateral to claim No. 96.

Bonds owned by C. A. Otis:
Nos. 33 to 44, inclusive, and 61 to 64, inclusive, $5,000 each; total $80,000
Collateral to claim No. 155.

Bonds owned by estate of Amasa Stone:
Nos. 45 to 60, both inclusive, $5,000 each; total $80,000
Collateral to claim No. 157.

(Endorsed on back:) Schedule of mortgage bonds held as
202 collateral. Brown, Bonnell & Co.

The original bonds herein enumerated exhibited to me and this schedule filed December 29th, '84.

A. J. RICKS, *Master.*

In the Circuit Court of the United States for the Northern District of Ohio.

THE LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL & COMPANY.

Testimony Taken before A. J. Ricks, Master.

DECEMBER 22, 1884.

Complainants' counsel offered in evidence the report of the master

on the indebtedness of Brown, Bonnell & Co., made to the court on the — day of ——, 1884, and the decree of the court confirming said report.

Complainants' counsel also offered in evidence a certified copy of the mortgage executed by Brown, Bonnell & Co. to Dan. P. Eells and John Hay, trustees.

Counsel for the defendant consented that complainants' counsel might offer in evidence the bonds in controversy at any time, whether counsel for defendant were present or not.

Whereupon complainants rested.

203 *Defense.*

ROBERT MCCURDY, called by the defendant, being duly sworn, testified as follows:

By Mr. CRAWFORD:

Q. Please state your name, residence, and occupation.

A. My name is Robert McCurdy; residence, Youngstown, Ohio; occupation, president of the First National Bank of Youngstown.

Q. How long have you been president of that corporation?

A. Since about January, 1887.

Q. How long have you been a citizen of Youngstown?

A. I have been a citizen of Youngstown about forty years. I am forty-two years old.

Q. Will you please state whether you have, during the last ten or twelve years, been more or less familiar, constantly, with the corporation known as Brown, Bonnell & Co.—its property, business, and credits.

A. I have been—have had knowledge of it.

Q. Has not that corporation almost continuously for ten years prior to the appointment of a receiver had business relations with your bank involving bank accommodations and the discount of paper?

A. Our bank has had very little business with the corporation of Brown, Bonnell & Co. only up to within a recent time. We had business with the early partnership, but after it became a corporation the business was done mostly with the other bank there. We did not have much business with them.

Q. What bank?

A. The Mahoning National.

Q. Are you a director in the Mahoning National?

A. No, sir.

204 Q. State whether you have known pretty familiarly for ten years the property of Brown, Bonnell & Co.

A. I have certainly known it. I could not say whether familiarly or not. I have known of the institution very decidedly as being one of our main concerns.

Q. State what your knowledge was as to the amount of bank

credits and paper that the company was carrying, say for two years prior to the appointment of a receiver.

A. I have no knowledge of that, except so far as it relates to the loan of our own bank.

Q. Is the First National Bank of Youngstown a creditor of that corporation?

A. Yes, sir.

Q. To what amount?

A. To the amount of $50,000.

Q. When did it become a creditor?

A. I cannot give you that exactly. It was shortly before the receiver was appointed. I did not know the bearing of this hearing to-day, and I did not go into the office to look at memoranda. I can get you that and send it to you.

Q. The receiver was appointed on the 19th or 20th of February, 1883. How long was it before that, do you think—one month or two months or three months?

A. I do not think more than a month before that.

Q. What officer of the corporation made the transaction?

A. The officer was Mr. Matthews, vice-president and treasurer.

Q. Was the transaction made personally with you as an official of the First National Bank of Youngstown?

A. Yes, sir.

205 Q. State whether you knew at that time whether there was any mortgage upon the property of Brown, Bonnell & Co.

A. No, sir; I did not.

Q. During your residence in Youngstown were you or were you not aware as to whether or not the property of Brown, Bonnell & Co. had ever been subjected to a mortgage?

Objected to. Objection overruled.

A. I never knew of any mortgage.

Q. How long had that company been engaged in business there—first as a partnership and then as a corporation?

A. I think since 1854.

Q. Had they, during all that time and down to the time of the receivership, owned a very large amount of real estate and a large and constantly growing plant there?

A. They had.

Q. You may state whether in consequence of the way in which they did business they were not during all that time using their credit in the banks of the place and elsewhere?

A. I think, for a large portion of the time, under the old management, they were out of debt and not having any bank accommodations; but latterly, of course, they were using large bank accommodations.

Q. Please designate about the time that the era of bank accommodations began in the management. How many years before the receivership, if you know?

A. They began to have large bank accommodations since your clients got hold of it.

Q. That was about what time?

A. I cannot remember.

206 Q. Three or four years before the receivership?

A. I should think it was about three years.

Q. What effect upon the credit of Brown, Bonnell & Co. had the fact that the corporation had never executed any mortgage upon its plant at Youngstown?

Objected to. Objection sustained.

Q. Were you aware, at the time your bank became a creditor of Brown, Bonnell & Co. to the amount of $50,000, that there had been a mortgage executed to Dan. P. Eells and John Hay, trustees, in April 1882, covering the entire property of Brown, Bonnell & Co. in Youngstown, to secure an issue of $500,000 of bonds?

Objected to. Objection overruled.

A. I was not aware of it.

Q. Did you know, at the time of this transaction with Brown, Bonnell & Co., that Mr. Dan. P. Eells, Charles A. Otis, and Mr. William H. Harris were directors in the corporation of Brown, Bonnell & Co.?

A. I knew that Mr. Otis and Mr. Eells were directors, and if Mr. Harris was a director I probably knew that, but I do not recall now the list of the directors.

Q. Were you aware when you became the creditor of Brown, Bonnell & Co., shortly before the receivership, that Messrs. Eells, Otis, and Harris were claiming to have a prior lien upon the entire plant of Brown, Bonnel & Co. by virtue of holding certain bonds issued in April, 1882, as collateral security for their indorsements?

207 Objected to. Objection overruled.

A. I had no knowledge of anything of the sort.

Q. State whether you would have made the transaction which you did make if these facts had then been known to you.

Objected to; objection overruled; exception.

A. I would not.

Q. When was the first knowledge that you had of the existence of this mortgage to Eells and Hay?

Objected to; objection overruled; exception.

A. It was immediately after the failure of John V. Ayer's Sons.

Q. State whether you did or did not make any inquiry at the time you became the creditor of Brown, Bonnell & Co. as to whether or not there was any incumbrance upon the property.

A. I made the inquiry of F. H. Matthews.

Q. State when and where the conversation was and who were present.

A. The conversation took place in the office of the bank, and there was no person person present but Mr. Matthews and myself.

Q. What was your inquiry and what was the response thereto?

Objected to.

The master held that unless counsel stated professionally and in good faith that he expected to trace the statement sought to be proved to the knowledge of the directors of the company and to show that it was made by their authority the objection would be sustained and the testimony ruled out as incompetent.

Mr. CRAWFORD: I only expect to connect it in the way of
208 assuming, as a matter of logic and reasoning, that Mr. Matthews' conduct in that respect was all in pursuance of an arrangement made when this mortgage was gotten up, and that was that it was agreed among all of the directors, including these present beneficiaries, that its existence should be concealed from the public and from creditors, so as to preserve the credit of the company.

The master admitted the testimony subject to exceptions.

A. I told Mr. Matthews that word had come that there was a mortgage on the property. He said there was no mortgage. I asked him if one was ever authorized. He said, "No."

No cross-examination.

R. J. WICK, called by the defendant, being duly sworn, testified as follows:

(By Mr. CRAWFORD:)

Q. Please state your residence and occupation.

A. Youngstown, Ohio; I am secretary and treasurer and a director of Brown, Bonnell & Co.

Q. How long have you been a director of Brown, Bonnell & Co.?

A. Since the January meeting of 1882.

Q. How long have you known of the property and of the affairs of Brown, Bonnell & Co.?

A. For about twenty-five years.

Q. During all that time have Brown, Bonnell & Co. owned a large amount of real estate that has their plant upon it at Youngstown?

A. Yes, sir.

Q. State whether or not Brown, Bonnell & Co. had ever executed, prior to this mortgage to Hay and Eells, any mortgage upon
209 their property.

A. Not to my knowledge.

Q. Be good enough to state whether in the year 1882 Brown, Bonnell & Co. were using or were not using their credit very largely to conduct their business.

A. They were.

Q. About what amount of blank paper and rediscounted paper were they carrying during that year?

A. I do not know; I cannot state.

Q. A small amount or a large amount?

A. A large amount.

Q. Several hundred thousand dollars?

A. Yes, sir.

Q. Were you present at the meeting at which this mortgage to Eells and Hay was ordered to be executed?
A. I was.
Q. Have you the record book here?
A. Yes, sir.
Q. What is the date of it?
A. April 3d, 1882.
Q. Be good enough to turn to that meeting. I suppose you kept the minutes, did you?
A. No, sir.

(By Mr. CRAWFORD:)

Q. Who were present at that meeting?
A. There were Mr. Matthews, Mr. Ayer, Mr. John I. Williams, Mr. A. W. Jones, and myself.
Q. When was the next meeting after that was authorized?
A. The next meeting was on the 29th of December of that year.
Q. Who were present at that meeting?
A. At that meeting there were present Mr. Ayer, Mr. Matthews, John I. Williams, myself, A. W. Jones, Mr. Eells, Mr. Otis, and Mr. Harris.

Q. Were there any meetings of the board of directors in-
210 tervening between April, 1882, and December?
A. None on record.
Q. Were you present at any?
A. No, sir.
Q. Did you ever attend or were you ever asked to attend any meeting of the board of directors at the house of Mr. Stone, in Cleveland?
A. No, sir.
Q. In either June or September?
A. No, sir.
Q. Did you ever receive any notice to attend any meeting?
A. No, sir; not to my knowledge.

Defendant's counsel offered in evidence the original minutes of the meetings of the board of directors of Brown, Bonnell & Co. held April 3, 1882, and December 29, 1882.
Objected to as not sufficiently proved.

Q. This is the record book, is it?
A. Yes, sir.
Q. And are you the custodian of it and the secretary of the corporation?
A. I have been since January, 1883.

(By complainants' counsel:)

Q. You did not enter those minutes?
A. No, sir.

(By Mr. CRAWFORD:)

Q. Was there anything said at the meeting at which this mort-

gage was executed with regard to the use that the bonds were to be put to or as to whether the mortgage was or was not to go upon record?

Objected to. Objection overruled.

A. Not at that meeting in April.

211 Q. You were present at the meeting in December, were you?

A. Yes, sir.

Q. Please state all that was said at that meeting on those subjects, if anything, and who said it.

A. It was agreed verbally——

Objected to.

(By the MASTER:)

Q. Give us what was stated or the substance of it as nearly as you can.

A. That was what I was about to do. Perhaps it would be fair to go back to the January meeting of 1882. That was when this mortgage was first talked of.

(By complainants' counsel:)

Q. You are only asked now about the December meeting.

A. Well, the directors all—I cannot say exactly who was the speaker and who was not. Mr. Eells and Mr. Harris did some speaking, and Mr. Ayer and Mr. Matthews. I do not think that I did any. And the substance of it was——

Objected to.

The MASTER: I am inclined to think you ought to state, if you can, who made the statements you are about to give and in whose presence.

A. Mr. Eells, Mr. Matthews, and Mr. Ayer were the principal talkers. They said, "This will not"—(objected to). I do not know that I can relate this thing satisfactorily to all. I am merely giving my remembrance of it; it is not a matter of record.

(By the MASTER:)

Q. Take Mr. Eells, now. You mention him as one of the gentlemen.

A. He said, "It will not do for the credit of the concern for this to go on record."

(By Mr. BALDWIN:)

212 Q. Now, you are undertaking to tell what Mr. Eells said?

A. Yes, sir.

(By Mr. CRAWFORD:)

Q. This was in the December meeting, was it not?

A. No; this was previous to that.

(By Mr. BALDWIN:)

Q. You are asked simply about the December meeting.
A. Well, I cannot state about the December meeting.

(By Mr. CRAWFORD:)

Q. Do you remember any meeting of the board of directors or meeting at wnich Mr. Eells was present other than a regular board meeting at which a conversation occurred between him and Mr. Matthews with regard to this mortgage?
A. Yes, sir.
Q. When was that?
A. (Referring to minute book.) He was at the meeting of December 29th. You asked me if he attended any regular meeting.
Q. I asked when it was that you were present at a conversation that occurred between Mr. Eells and Mr. Matthews with regard to this mortgage. Was that conversation at that meeting?
A. The conversation was at the regular meeting, I think, in January, 1883. I do not remember any conversation at the meeting of December 29th.
Q. Was Mr. Eells present at the annual meeting in January, 1883?
A. Yes, sir.
Q. That was the month before the receiver was appointed, was it?
A. Yes, sir.
Q. Did you hear any conversation between him and Mr. Matthews with regard to this mortgage at that meeting?
A. I did.
Q. Please state what it was. (Received subject to exceptions.)
A. Mr. Matthews asked Mr. Eells how it became known
213 that the mortgage was issued, it not having been put on record. Mr. Eells said he could not account for it; that nobody at their bank knew anything about the existence of the mortgage but himself and Mr. Colwell, and he could not account for it being known.
Q. Was there anything said in that interview about the conversation that had occurred between Mr. Matthews and Mr. McCurdy?
A. Mr. Eells asked, I believe, "How do you know it is known?" Mr. Matthews said he heard it through Mr. McCurdy or heard it up street. I forget whether he said Mr. McCurdy or up street. He said he heard it up street, I believe.
Q. Outside of the conversation at that meeting at which Mr. Eells was present state whether there was anything said among the directors who were present at the meeting when this mortgage was executed as to whether it should or should not go upon record or what use was to be made of the bonds.
A. Mr. Eells was not present at that meeting.
Q. I understand that. I am talking of the meeting when this mortgage was authorized.
A. April 3, 1882?
Q. Yes, sir.
A. No, sir; not at that meeting.

Q. Do you say there was nothing said at all?

A. Not April 3, 1882, there was not.

Q. I am not asking whether anything was said by Mr. Eells, but whether there was any conversation among the directors as to whether the mortgage was to be recorded or not to be recorded or as to what was to be done with the bonds.

A. At this meeting of April 3, 1882, there was not, to my
214 best knowledge.

Q. When was the first meeting of the directors at which anything was said on that subject?

A. January, 1882. This mortgage was talked of at that meeting.

Q. At what time was the annual meeting of Brown, Bonnell & Co. held in 1882?

A. January 17.

Q. Were you there at that meeting?

A. I was.

Q. Was Mr. Eells there?

A. Yes, sir.

Q. Was Mr. Otis there?

A. Yes, sir.

Q. Was Mr. Harris there?

A. Yes, sir.

Q. Was anything said at that meeting with regard to a contemplated mortgage to be executed by Brown, Bonnell & Co.?

A. Yes, sir.

Q. Who said it?

Objected to. Admitted subject to exception.

A. Mr. Eells and Mr. Ayer were the principal spokesmen. They said, "It will not do to have this mortgage"—

Objected to.

Q. Give us the language of Mr. Eells as nearly as you can on that subject.

A. I am trying to give it. He says, "It will not do for this mortgage to go on record, as it will impair the credit of the concern." And there was a talk of half an hour. I cannot recollect every word that was uttered, but that was the universal con-
215 versation and import of the talk.

Q. Was the amount of the mortgage talked of?

A. Yes, sir.

Q. How much was it to be?

A. $500,000.

Q. Was anything said, and, if so, what and by whom, with regard to what was to be done with the half million of bonds that they were talking about issuing and making a mortgage to secure? Who made the speech and what did he say? Give the substance and the individual as nearly as you can.

Objected to. Testimony admitted subject to exceptions.

A. Mr. Ayer said the bonds would be left at the Commercial National Bank to secure certain indorsements.

Q. What certain indorsements, if anything was said?
A. Future indorsements—indorsements to be given.
Q. Was this mortgage that was authorized on April 3, 1882, executed in accordance with the conversation of January previous, or was it a different instrument entirely?

Objected to. Objection sustained. (Legal inference.)

Q. I will ask you as a matter of fact whether you ever made a statement that this mortgage had been executed and delivered to Hay and Eells before the appointment of a receiver.
A. No, sir; I never did.
Q. Are you aware whether the fact was or was not generally known at Youngstown that such a document as that had been executed?
A. It was not, to my knowledge.
Q. Was any inquiry made of you about it prior to the receivership as to whether or not there had been any such mortgage?
216 A. No, sir.
Q. You were aware when this mortgage was recorded?
A. Yes, sir.
Q. When did you hear of its being recorded?
A. I think it was the Saturday of the failure of John V. Ayer's Sons—the day of the failure of John V. Ayer's Sons; either the night before or that same day.
Q. How did you hear of it?
A. Mr. Colwell was in Youngstown to have it put on record.
Q. Did you see him?
A. No, sir; I did not see him.
Q. All you know about that is what you have heard?
A. Yes, sir.

Cross-examination by C. C. BALDWIN, Esq.:

Q. I wish you would tell me what is the date *is* that meeting on page 65 of your minute book.
A. April 3, 1881.
Q. And when is the next meeting recorded there?
A. The next meeting is the 17th of January, 1882.
Q. And when is the next meeting recorded there?
A. April 3, 1882.
Q. And when is the next meeting?
A. December 29th, 1882.
Q. And when is the next meeting?
A. January 16, 1883.
Q. When is the next one?
A. January 15, 1884.
Q. Were those or were those not all the meetings which were held between those times?
217 A. All that I know of that are recorded.
Q. Those meetings that you have been speaking of were directors' meetings, were they?
A. Yes, sir.

Q. And those were all the directors' meetings that you know of during that time?

A. Yes, sir.

Q. You talked some time ago about a directors' meeting that was not on record there—that was not what you called a regular meeting—did you not?

A. No, sir.

Q. You say that you were present at the meeting of the directors in January, 1882?

A. Yes, sir.

Q. Where was that meeting held?

A. At Brown, Bonnell & Co.'s office, in Youngstown.

Q. And was that the meeting at which you testified that Mr. Eells made some remarks about this mortgage?

A. Yes, sir.

Q. Was any action taken by the board at that meeting in regard to this or any other mortgage?

A. No, sir; there was none recorded.

Q. Was there any action taken?

A. No, sir; not that I know of. I wish to correct that in this way, by saying there was an informal talk.

Q. Who spoke first in that informal talk?

A. H. C. Ayer was president of the meeting.

Q. You have not answered my question. Who spoke first in that informal talk?

A. I cannot tell you.

218 Q. Do you remember what anybody said about it except Mr. Eells?

A. Yes, sir.

Q. Who?

A. Mr. Ayer did some talking.

Q. Let us know what Mr. Ayer said.

A. I cannot give you word for word. I give you the substance of it.

Q. Give us the substance of it.

A. The substance of it was that it would not do for this mortgage to go on record; that it would impair the credit of the concern.

Q. To whom did Mr. Ayer say that?

A. To the meeting.

Q. Is that the first thing that you remember to have heard said about the mortgage?

A. No, sir.

Q. You heard Mr. Ayer say that, did you?

A. Yes, sir.

Q. What else did you hear Mr. Ayer say?

A. Well, sir, there was a talk there of a half hour or an hour.

Q. If you can remember anything that Mr. Ayer said, tell that.

A. Mr. Ayer called the meeting to order.

Q. I do not care about his calling the meeting to order. I want to know what else you remember that he said about the mortgage.

A. You asked me what he said. I am trying to recall it to memory. Mr. Ayer said, "I have made arrangements with a bank in New York to raise funds at some future time within the year to take up this mortgage."

Q. Take up what mortgage?

A. Take up these bonds.

219 Q. Take up what bonds?

A. The bonds that were contemplated at that meeting and talked of—an issue of bonds; told of making arrangements with this bank in New York, that he could take it up; therefore he did not want it to go on record. That was one thing he said. I, perhaps, if I had time, could call to memory a good many things that he said.

Q. What else did he say?

A. He said he had not any hesitancy in saying that he could raise the funds to take up these bonds without their being used.

Q. Anything more?

A. Not that I can remember just now.

Q. Then you understand that Mr. Ayer gave the meeting to understand that if this mortgage was not recorded he would be able within a short time to raise money in New York to take up the indebtedness secured by the bonds and mortgage?

A. Yes, sir.

Q. Whom else did you hear say anything about its not going on record besides Mr. Eells and Mr. Ayer?

A. Colonel Harris.

Q. Let us know what Colonel Harris said.

A. He did not generally say much of anything excepting to say it would not do; acquiesced in the balance of the meeting.

Q. Give us the precise words as near as you can.

A. I think he said, "Yes, it won't do." I think those were his words, if I remember right.

Q. Did he not use the same language precisely that Mr. Ayer and Mr. Eells did?

220 A. I do not think he did.

Q. Which was it that said that it would not do to have it go on record, as it would impair the credit of the concern? Was that Mr. Ayer or Mr. Eells?

A. They both said it.

Q. They both used precisely the same words?

A. I cannot say as precisely the same words, but they both said it.

Q. What more do you remember about that conversation?

A. It was a long talk; I cannot recollect the conversation entire.

Q. When were those bonds issued?

A. They were authorized to be issued April 3, 1882.

Q. When were the bonds issued?

A. I cannot tell you; I was not the treasurer of the company.

Q. What office did you hold in January, 1882?

A. Director.

Q. Can you tell us anything more about that conversation that took place at that time?

A. I told you that I could not.

Q. How long was that meeting of January, 1882?
A. About an hour.
Q. Was there more than one meeting on that day?
A. A meeting of stockholders and a meeting of directors.
Q. In which did this conversation take place?
A. In the meeting of directors.
Q. State whether there was any conversation about it in the stockholders' meeting.
A. I think not.
Q. I understand you to say that the issue of those
221 & 222 bonds and that mortgage was authorized in April, 1882?
A. There was a resolution passed on that date that they be issued; yes.
Q. Did you have anything to do with the issue of them?
A. I was a director; voted on it; that is all.
Q. Who were the general business men who managed the affairs of that corporation?
A. H. C. Ayer and F. H. Matthews.
Q. Did they have pretty full control of the business of the company?
A. Yes, sir.
Q. They managed it with very few directors' meetings, did they not?
A. They had two that year.
Q. How will you put it? Did they manage it with very few directors' meetings or were there a good many?
A. Well, you may say very few.
Q. Had but two that year?
A. Well, no; there were three. There was a regular directors' meeting and two specials.
Q. You say that at the meeting of April 3, 1882, there was no conversation whatever in regard to this mortgage being kept off the record?
A. Not that I can recollect.
Q. You say that at the meeting in January, 1882, Mr. Ayer talked about making a mortgage to secure future indorsements?
A. Yes, sir.
Q. And that mortgage was to be left at the Commercial National Bank?
223 A. The bonds were to be.
Q. Where was the mortgage to be?
A. It was put in the hands of trustees.
Q. Who were the trustees?
A. Dan. P. Eells and John Hay, I believe.
Q. Now, we come down to the meeting of December 29, 1882, and you say there was nothing said about keeping that off the record?
A. I do not recollect. The meeting was called for the purpose of negotiating the bonds, I think, and it was concluded not to negotiate them at the present time. I think that was the business of the meeting.
Q. Then the course of it was that these bonds were put up to se-

cure future indorsements, and then afterwards it was thought that they could negotiate the bonds?

A. Yes, sir.

Q. The next meeting was in January, 1883?

A. Yes, sir.

Q. And did I understand you to say that anything was said at that meeting about the recording of that mortgage?

A. I think there was.

Q. Then the meeting of January, 1882, was not the only time when there was talk about not recording that mortgage? You were wrong in thinking that January, 1882, was the only time when there was anything said about not recording the mortgage?

A. I do not think I said so.

Q. Where was the meeting of January, 1883?

A. At Brown, Bonnell & Co.'s office.

Q. How long did it last?

224 A. About the usual time, an hour.

Q. Was there both a stockholders' meeting and a directors' meeting?

A. Yes, sir.

Q. Was there any talk about it in the stockholders' meeting?

A. No, sir.

Q. How long did the directors' meeting last?

A. When I say an hour I mean the directors' meeting. The stockholders' meeting never lasted but just a few moments, to elect directors.

Q. Was the first thing that was said said while the meeting was organized or informally?

A. It was said after the election of officers.

Q. Who talked first about the record of that mortgage?

A. Mr. Matthews asked the question of Mr. Eells how it became known.

Q. Mr. Matthews in that meeting asked the question or Mr. Eells how it became known that the mortgage was in existence, did he?

A. That is my impression, that it was at that meeting.

Q. How did it become known?

A. Mr. Eells said that he could not account for it; that there was nobody knew of the existence of it at their bank but himself and Mr. Colwell, and that Mr. Colwell would not have made it known, and he was certain that he did not.

Q. What else was said about it?

A. Mr. Matthews related of hearing it up street, and Mr. Eells could not account for it—merely reiterated that he could not account for it; that nobody knew of its existence but himself and Mr. Colwell at their bank; that no one else knew of it that he knew of.

225 Q. What was the condition of John V. Ayer's Sons at that time as to credit?

A. Their credit was supposed to be good at that time.

Q. And their credit was supposed to be good up to the time of their failure, was it not?

A. I supposed it was.
Q. What position do you occupy in this matter?
A. In what matter?
Q. In the matter of this controversy. What interest have you in it?
A. I have not any.
Q. Are you a creditor of Brown, Bonnell & Co.?
A. I represent certain credits—certain notes.
Q. To what extent?
A. About $30,000.
Q. Are those in your name or in somebody else's name?
A. Somebody else's name.
Q. In whose name?
A. The Shenango Coal Company has $19,000; the Leadville Coal Company has about $11,000.
Q. Have you any money interest in those claims?
A. No, sir.
Q. Are you a stockholder in either of those concerns?
A. I am a stockholder in the Leadville; yes. I own one share of stock, enough to make me a director.
Q. Who does own the majority of stock of the Leadville Coal Company.

Objected to; objection overruled.

226 A. Do you ask whose name the stock stands in?
Q. I ask you who owns it.
A. I cannot tell you, only as it stands on the books.
Q. What office do you hold in that company?
A. I am receiver now.
Q. In whose name does the majority of that stock stand on the books?
A. Henry Crawford's.
Q. How does the majority of the stock of Brown, Bonnell & Co. stand on the books?
A. In the name of H. C. Ayer, I believe.
Q. Are you an officer of Brown, Bonnell & Co.?
A. I am now; yes, sir.
Q. What officer?
A. Secretary and treasurer and director.
Q. Do I understand you to say that, aside from this mortgage that is now in dispute here, Brown, Bonnell & Co. never executed any mortgage on any of their property?
A. Not to my knowledge.
Q. You never knew of any?
A. No, sir.
Q. How intimately have you been acquainted with the matters of Brown, Bonnell & Co. for the last ten years?
A. I have been associated with them since May, 1878, in their office.
Q. How long have you been a director?
A. I was first elected a director in January, 1882.

Q. I will ask you whether there was not an incumbrance on the Struthers furnace?

A. It was bought on a contract.

227 Q. Was there not an incumbrance on it? Did they not want a mortgage made on it, which has been paid off by the receiver since this action was commenced?

A. There was a contract, I believe.

Q. There may have been a contract. Now I ask you whether that was turned into a deed and mortgage?

A. I never knew of any mortgage on the Struthers furnace.

Q. And do you undertake to say that you never knew of Brown, Bonnell & Co. making any mortgage on any of their property?

A. No, sir; I do not undertake to say that. I undertake to say that I never knew of any mortgage until the mortgage authorized April 3, 1882.

Whereupon the further taking of testimony was adjourned until Monday morning, January 5, 1885, at 10 o'clock.

228 LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL & COMPANY.

Testimony Taken before A. J. Ricks, Esq., Master, Jan'y 9, 1885.

Present on the part of intervening petitioners: Hon. C. C. Baldwin and A. St. John Newbury, Esq.

Present on the part of respondents to intervening petitioners: Henry Crawford, Esq.

ASA W. JONES, a witness on the part of the respondents to intervening petitioners, being duly sworn, testified as follows:

(By Mr. CRAWFORD:)

Q. State your name, residence, and occupation.

A. My name is A. W. Jones; I reside at Youngstown; age, 46. occupation, attorney.

Q. Have you been a director of Brown, Bonnell & Co.? If so, state when you became director, and whether you have since continued to be such an official.

A. I am a director of Brown, Bonnell & Co., and I have been for some years. I cannot tell from recollection the year that I was first elected; perhaps it was in 1879.

229 Q. You have been continuously, then, a director for the last four or five years?

A. Yes, sir.

Q. Were you present at a meeting of stockholders of that corporation, and a meeting of the board that immediately succeeded the stockholders' meeting, in January, 1882?

A. I was.

Q. Please state whether at either of those meetings, and, if so, which, anything was said among the people there present as to the execution of a mortgage covering the entire property of Brown, Bonnell & Co. If so, give the conversation fully.

A. I may not be able to distinguish between conversations at the stockholders' meeting and the directors' meeting, because those meetings were composed of substantially the same persons. There was little or no difference between the two meetings, as to the persons that composed them. I would not undertake to say now what formal action was taken, or whether it was taken at that meeting. I have not looked at the records, but at some time there was some formal action taken with regard to a mortgage. Whether it was at that meeting or not I am unable to say; the records will tell; but at that meeting—and allow me to say in parentheses that, as I remember, the stockholders' meeting and the directors' meeting were both upon the same day, and I cannot tell, of course, which meeting—perhaps both meetings—there was talk about the execution of a mortgage upon the entire property of Brown, Bonnell & Co. What that talk was I am unable now to say. The substance of it was——

230 Objected to by Judge Baldwin. Objection overruled.

Judge BALDWIN: All this testimony may be taken subject to exception.

WITNESS: I can say this, that at that time the principal conversation was between Mr. Ayer and Mr. Eells with regard to the execution of this mortgage. Now, my recollection would be that this was about the conversation in substance: That Mr. Ayer suggested the propriety of making a mortgage, and that he talked with Mr. Eells about the probability of being able to negotiate such a mortgage, and they talked principally upon the question of whether such a mortgage could be negotiated. I do not know that I can state any more fully what the conversation was unless my attention is called to something.

Q. Who were present at that meeting, as far as you remember?

A. There was Mr. Eells and Mr. Ayer, I think Mr. Rhodes, and my recollection is Mr. Harris, Mr. John I. Williams, and Mr. Matthews. I cannot say definitely that I could name anybody else now at this moment.

Q. Was there anything said in that meeting by any one, and, if so, by whom, as to whether this mortgage was or was not to be recorded? If so, give any such declarations and who made them.

A. I am unable positively to tell who made them more than to say, as I have already said, the principal talk was between Mr. Ayer and Mr. Eells, Mr. Eells being a financial man and Mr. Ayer really representing the corporation. There was talk, in sub-
231 & 232 stance, like this: That if the mortgage was recorded it would injure the credit of Brown, Bonnell & Co., and for that reason it would not be either proper to record the mortgage or to give anybody any information with regard to it; that it must be kept a profound secret. Now, I cannot say that anybody said in

words anything that amounted to an agreement, but I know this, that it was said there by substantially everybody that that was true, but perhaps I had better stop there.

Q. Was there any talk at that meeting as to the amount of this mortgage?

A. My impression is that it was talked of as a mortgage for $200,000 and afterwards for $500,000.

Q. You were secretary of the company at the time?

A. I was; yes, sir.

Q. This mortgage appears to have been reported to a board meeting on the 3rd of April, 1882, and copied at length in the minutes, minus the signatures and acknowledgements. The mortgage introduced in evidence bears an acknowledgement by you as secretary, dated, I think, on the 14th of June, 1882. (Mortgage shown witness.) Please explain how the acknowledgement came to be made on that day.

A. The simple reason why it came to be made on that day, so far as I was concerned, that was the time when it was presented to me to be executed.

Q. Do you remember who presented it to you?

A. I could not say certainly. It may have been Mr. Matthews.

Q. Do you remember what you did with the mortgage after you acknowledged it?

233 A. I sent it to Mr. Ayer, at New York, by mail.

Q. You remained a director of the company continuously during the year 1882, and so on, I believe you said?

A. Yes, sir.

Q. Did you disclose the existence of this mortgage to any one?

A. I did not.

Q. Do you know of any other director that did?

A. I do not.

Q. Do you remember any conversation that occurred at the stockholders' meeting in January, 1883, with regard to this mortgage?

A. I remember a conversation that occurred either at a stockholders' meeting or a directors' meeting. I could not say which.

Judge BALDWIN: This may be taken subject to exception.

Q. State who participated in that conversation and what the conversation was.

A. Mr. Eells participated. I did myself, and I think one or two others, but I could not be certain so as to name them. The conversation was this: Some one said in that meeting, and my impression is that it was Mr. Matthews, that information had got out of the making and execution of this mortgage, and that it was giving him trouble in getting discounts, etc. I think I remarked then that I thought that came from Cleveland, for Mr. Joseph Butler had told me that he had heard of the mortgage, and that he learned it in Cleveland. To that Mr. Eells replied like this: That it did

234 not come from Cleveland, for he knew that there was nobody in Cleveland — knew about it but himself and Mr. Colwell, the cashier of the bank; that the mortgage was in the vault of their

bank, and that nobody had information of it but himself and Mr. Collwell, and they had not told anybody.

Q. Had the mortgage then been recorded?

A. No, sir; it had not.

Q. Do you know whether this mortgage covers all of the property of Brown, Bonnell & Co.?

A. I think it does.

Q. Was there ever any order of the board of directors or any talk among the directors as to what use was to be made of these bonds?

A. If there was any it would probably be shown by the record. I have no recollection of any such talk.

Q. Were you aware, as a director of the company, in January, 1883, as to whether any disposition had been made of these bonds or any of them?

A. I was not, sir. I had suspicions, but not knowledge.

Q. Do you know in what condition the firm of Brown, Bonnell & Co. was for some months prior to January, 1883, as to finances—whether it was in easy circumstances or hard pressed?

A. I have no personal knowledge. I did not know the amount of bills receivable of Brown, Bonnell & Co., nor I do not now remember that I knew the amount of bills payable. I knew, however, that they required a very large amount of money to
235 carry on their business, and they required very large discounts. So far as I knew they were in good credit and able to obtain large discounts and large amounts of money to carry on their business.

Cross-examination by Judge BALDWIN:

Q. How long have you been connected with Brown, Bonnell & Co., do you say?

A. My impression is that it is since January, 1879. I may be in error a year.

Q. Are you a stockholder in that corporation?

A. Well, a very small one, sir.

Q. How long have you been a stockholder?

A. Ever since I have been connected with it.

Q. Did I understand you that you have been secretary of that corporation?

A. I have; yes, sir. I think that I was made secretary a year subsequent to the time that I was made director. As I remember, Mr. Phillips was secretary the first year that I was director.

Q. Then you think you became secretary in 1880, and how long did you continue secretary?

A. I continued secretary up to the time that Mr. Chambers was elected, which, I think, was in January, 1883.

Q. And what connection have you with the corporation now?

A. Well, I do not know hardly how to answer that question, Judge. I am a director still.

Q. Do you hold any other office?

236 A. No, sir.

Q. Where was that first meeting which you talk about

where this mortgage was first talked of or where a mortgage was first talked of?

A. It was at the office of the company in Youngstown.

Q. And when was that meeting?

A. My recollection is that it was in January, 1882, at the annual meeting, which occurred, I believe, the third Tuesday in January in each year.

Q. Do I understand you to say that that was the first time at which you heard of a mortgage being talked of?

A. It is the first that I now remember of. I may have heard talk before, but I have no recollection of any talk prior to that time.

Q. Do you remember who first suggested the making of a mortgage?

A. My impression would be it was Mr. Ayer.

Q. What share did Mr. Ayer have in the management of the company?

A. A very large share.

Q. Did he, substantially, attend to all the business of the concern?

A. Yes, sir. He had a controlling interest in the stock, and, while he advised with the others, he generally followed what he thought was best.

Q. Do you remember what he said about the purpose for which the mortgage was to be made?

A. I do not remember now. I do not remember whether he stated any purpose. Of course, we would pretty well understand the purpose, probably—for the purpose of raising money.
237 Indeed, I do not know but it was said something like this—I think it was—that it was better to raise a permanent fund than to raise so much by discounts.

Q. Was anything said at that meeting about keeping the mortgage off the record?

A. I think there was—that it would not do to put the mortgage upon record.

Q. Then you mean to tell the court that Mr. Ayer proposed to raise a permanent fund on bonds and mortgage without putting the mortgage upon record?

A. You perhaps misunderstand me. There was talk like this: That if such a mortgage should go upon record that it would injure the credit of Brown, Bonnell & Co. Now, my recollection is this: That no very definite idea was determined upon at that meeting. It was, if I may use the term, argued *pro* and *con*. Mr. Ayer thought it would be a good idea to make such a mortgage and thereby secure a large amount of money and save so much discounting. Another argued that to put such a mortgage upon record would so injure the credit of Brown, Bonnell & Co. that it would be crippled and unable to make discounts if it needed them, which it would need in addition to that sum. Then the inquiry was made of Mr. Eells, as he had large experience in financial matters, as to whether such a mortgage could be negotiated, and, as I remember, he thought it

probably could. But no definite idea, as I remember, was determined at that meeting.

Q. Then, as I understand it, the discussion at that time was whether it was for the benefit of the corporation to make bonds and a mortgage?

238 A. Yes, sir; whether it was best.

Q. Whether it was best to rely on the general discounts or whether it was best to rely on the mortgage and the negotiation of the bonds?

A. The negotiations of the bonds would not create sufficient money to carry on the business. That was understood. That there would have to be discounts in addition to the fund that would arise from the mortgage.

Q. Was it talked of that the bonds could be negotiated as a permanent investment, as you expressed it, and still that the mortgage could be left off the record?

A. I do not know that it was; no; but the question seemed to be discussed both ways, first, could such a mortgage be negotiated, and, second, if it was put upon record what would be the effect upon the credit of Brown, Bonnell & Co?

Q. What did Mr. Ayer say about that? What did he say first with regard to whether the mortgage could be negotiated?

A. I do not think Mr. Ayer gave very much of an opinion as to the negotiation of the mortgage. Mr. Eells' judgment was thought to be better than anybody's else upon a subject of that kind.

Q. Did Mr. Ayer at first propose to make a mortgage?

A. That would be my recollection, that he first talked about making such a mortgage.

Q. When was the next meeting at which you heard anything said about that mortgage?

A. Probably at the meeting at which the mortgage was ordered. I believe it was some time in April.

Q. I will ask you whether you were the attorney of Brown,

239 Bonnell & Co. at Youngstown?

A. I was; yes, sir.

Q. Did you draw this mortgage?

A. I did not. I think Mr. Sidney Strong drew that mortgage. I think I was away from home, and Mr. Strong drew it. I am certain that he did. I see it is witnessed by Mr. Strong and acknowledged by Mr. Merrick, his notary.

Q. It was submitted to you before you signed, was it not?

A. It was brought to me for execution.

Q. Did you examine it before you signed it?

A. Not as a lawyer at all. I may have looked it over, and think I did.

Q. You were a director of Brown, Bonnell & Co.?

A. I was.

Q. And executed it——

A. (Interrupting.) As secretary; yes, sir.

Q. And although you are a lawyer you did not examine it as a lawyer?

A. Not at all.

Q. Were you present at the meeting on the 3rd of April, 1882, when the mortgage was voted?

A. I presume I was. I think I have a recollection of being present at the time the mortgage was voted.

Q. Well, were you there or were you not?

A. My recollection is that I was there; I may not have been.

Q. Was there both a stockholders' meeting and a directors' meeting at that time?

A. I presume there was; but to say that I have a distinct
240 recollection of the two meetings is perhaps more than I would be able to say from my recollection.

Q. If there was a stockholders' meeting and a directors' meeting do you remember whether you were present at both?

A. If there were two I undoubtedly was present at both, if I was present at either, because they would be held, substantially, as one meeting.

Q. Do I understand you to say that you were secretary of Brown, Bonnell & Co. at that time?

A. Yes, sir.

Q. You say that after that mortgage was executed you sent it to Mr. Ayer, at New York?

A. Yes, sir.

Q. Was Mr. Ayer present at that meeting on the 3rd of April, 1882?

A. I think he was.

Q. And do you say that you executed that mortgage on that same day?

A. What same day?

Q. On the 3rd of April, 1882.

A. No, sir; I think I did not. I think I executed it on the 14th of June; at least that is the day the execution bears date, and I have no reason in the world to question its being a correct date. I think it is the correct date.

Q. Then you say that you know about this mortgage in April, 1882, and were secretary of the meeting at which it was voted?

A. I knew that such a mortgage was directed, but I do not think I ever saw the mortgage until it was brought to me for exe-
241 cution—that is, the mortgage prepared.

Q. It was copied into the record at the time at which you were secretary?

A. Yes, sir; but it is not copied in my handwriting, you will observe. The record of that meeting would be made up subsequent to the date of the meeting. I never wrote any of those minutes myself. Either Mr. Matthews or Mr. Rhodes originally used to write them. My impression is that the mortgage was not actually prepared, written out, by Mr. Strong until about the time I executed it?

Q. Although it was dated on the 3rd of April, 1882, it actually was not written until nearly June?

A. I think that is the fact, sir.

Q. Do I understand you to say that there was any conversation at that meeting in regard to whether the mortgage should be recorded or not?

A. I think there was definite talk at that meeting.

Q. On the 3rd of April, 1882?

A. Yes, sir.

Q. Who participated in that conversation?

A. To say definitely at this length of time who participated in the conversation would be impossible. I could give you my best judgment about it, if you want that.

Q. If you have any recollection of a conversation at that meeting I want it.

A. My recollection is that Mr. Eells and Mr. Ayer did the principal talking with regard to this mortgage at all the meetings.

Q. What is the first thing you remember being said about it at the meeting on the 3rd of April, and who said it?

242 A. To be able to give the exact order, indeed the exact words, of anything, as you know, would be impossible at this length of time. I can give the substance of the conversation that was had at those meetings. I would not undertake to give the first thing that was said nor the last thing that was said.

Q. Give us the substance of what the first man said. You say Mr. Ayer proposed that mortgage. Now, what did he say about it?

A. I cannot give Mr. Ayer's words; but the substance of what he said was that he thought best to execute a mortgage for five hundred thousand dollars upon the property of Brown, Bonnell & Co. That is about the substance of what he said.

Q. That was the substance of all he said?

A. I cannot say that it was the substance of all he said.

Q. Well, so far as you remember now?

A. Yes; so far as I remember now.

Q. So far as you remember that was the substance of all he said?

A. Yes, sir.

Q. Tell us what was the substance of what somebody else said.

A. The substance of what the rest said was that if he thought best we would join as directors and stockholders in directing it. That was the substance of it; but at the same time during that meeting it was said, as I remember, that for the purpose of guarding the credit of Brown, Bonnell & Co. it must not go upon record.

Q. Who made any such remark as that?

A. I would not be able to tell you. I would more think that such a remark came from Mr. Matthews than anybody else,

243 for he was the man that had more experience in that than anybody else. He negotiated all the discounts and attended to the financial matters of the concern; and, whatever was said, there was no disagreement in the board at all.

Q. Was the talk at that meeting similar to the talk at the previous meeting to which you have testified in January, 1882, when it was debated whether it was best to rely upon banks for discount or to rely upon raising the money by means of these bonds and mortgage?

A. The talk at the prior meeting had been much more crude than that which was had at this meeting. At this meeting it had assumed form. At the prior meeting it was simply an embryo, and there was simply talk with regard to such project. In the meantime the project had been prepared and determined.

Q. What was the project?

A. To make the mortgage.

Q. What was to be done with it?

A. There was nothing said, that I know of. I assumed, I guess, as some of the other directors did, that these men who were managing that part of it had determined that, and I did not care to know—did not ask.

Q. You say that as secretary of that company you acknowledged that mortgage in June, 1883?

A. I haven't any doubt that it was on the day that it bears date.

Q. And you say that you sent that mortgage to Mr. Ayer, at New York?

A. That is my recollection; yes, sir.

Q. For what purpose did you send that mortgage to Mr. Ayer, at New York?

244 A. Because I was instructed to send it there to him for execution.

Q. That mortgage was executed by him as well?

A. Yes, sir; as president.

Q. Did you understand that Mr. Ayer expected to raise money on it in New York?

A. Well, if you ask me what I understood——

Q. Did you have any such information? That is what I mean by that.

A. I supposed that he expected to raise the money. Whether he expected to raise it in New York or where I do not know. I was simply informed that he was there upon business, and directed to send it to him there for execution.

Q. Did you not expect that he would sell those bonds in New York to Eastern capitalists?

A. I do not know that I had any expectation as to his selling bonds to Eastern capitalists or any other particular capitalists. I did expect money would be raised in some way upon that mortgage. How, I do not know that I ever troubled myself to think about.

Q. You expected that he would sell those bonds to somebody?

A. I expected money would be raised upon that mortgage. I supposed that was the purpose of it.

Q. Did you expect that after money had been raised upon that mortgage the mortgage would be kept off the record?

A. I supposed it would.

Q. Those bonds amounted to a half million dollars?

A. Yes, sir; I do not know whether all the bonds were ever executed or not.

Q. You told us in your direct examination that your un-

245 derstanding of it was that those bonds were to be negotiated to somebody for a permanent investment.

A. No, I did not exactly say that in words; I said that at that meeting of January, 1882, the idea was discussed of raising a permanent loan by mortgage; but at the time the mortgage was directed by the board very little was said, in my recollection, upon that subject. It had been discussed at the January meeting, as I told you, and then when we came down to the April meeting I think Mr. Ayer presented the subject. He thought best to execute this mortgage and the board agreed with him and voted it, as I remember.

Q. The purpose of that mortgage, so far as you understand, was to raise money to take the place of money which otherwise would have to be raised by discount?

A. Well, I ought to say this: At the time when it was made I think there was very little said upon the subject. Still I did not suppose the mortgage was being executed for fun. I supposed it was being executed for the purpose of raising money in some way. How, it was not a part of my duties to attend to, so far as I was connected with the concern. I attended to its legal matters—that is, legal business and legal matters—and signed its papers, and the financial matters belonged entirely to Mr. Ayer and Mr. Matthews, and I never saw fit to trouble myself much about them.

Q. You knew that the mortgage would not take effect until it was left for record under the statutes of Ohio?

A. I do not know that; I really supposed it would.

Q. You know there is a statute on the subject?

A. I know that there is a statute upon the subject, but I
246 thought it was not a void paper because it was not upon the record.

Q. You are one of the attorneys now claiming that this mortgage is void because it was not recorded?

A. I think I have never taken any part, particularly, as an attorney, so far as this mortgage was concerned. I am attorney, generally, for Brown, Bonnell & Co., and have been in this general omnibus case; but I do not think I have ever taken any action—I do not remember that I have—with reference to this particular part.

Q. Your name is signed as one of the counsel to this very issue about which you are now testifying?

A. Perhaps it is, or I would not say that it was not.

Q. So that you are now claiming that this mortgage is void because it was not put upon record?

A. I do not make any claims about it myself; I have simply tried to give you the facts as far as I know.

Q. Did you ever make any suggestion to anybody connected with Brown, Bonnell & Co. that that would not be very good security if the creditors should take it?

A. I did not.

Q. Never suggested any of those views at any time?

A. No, sir; they were not asked of me.

Q. Who at that time handed you this mortgage for execution?

A. My impression is that it was Mr. Matthews; I think so.

Q. And you sent it yourself to Mr. Ayer at New York?

A. That is my impression now.

Q. Do you know anything about when or where the bonds were executed?

A. I do not; I never saw any of the bonds in my life.

247 Q. Where did Mr. Ayer reside at that time?

A. In Chicago.

Q. How long was he to be in New York?

A. I do not know that I knew definitely. I supposed a few days; a short time.

Q. Did he stop at Youngstown on his way back from New York to Chicago, do you know?

A. I have no recollection that he did.

Q. Why did you send it to him to New York, when he was there merely temporarily, rather than at Chicago, where he resided?

A. Because Mr. Matthews so directed.

Q. Then Mr. Matthews directed you to send it to Mr. Ayer?

A. Yes, sir; that is my impression now.

Q. That is just the reason why you did it?

A. Yes, sir.

Q. Do you know where Mr. Ayer is now?

A. I do not. I suppose he is abroad, but I have no personal knowledge.

Q. Do you know when he went abroad?

A. If you ask me for personal knowledge I should say no.

Q. When is the last time you ever saw him in Youngstown?

A. My impression is that it was at the annual meeting in 1883.

Q. Annual meeting in January, 1883?

A. Yes, sir; but he may have been there after that and prior to the 20th of February. I could not say certainly. But the last time that I can remember certainly that I can say I saw him was at the annual meeting of Brown, Bonnell & Co. of January, 1883.

248 Q. By whose authority are you at present the attorney of Brown, Bonnell & Co.?

A. Well, by the authority of Brown, Bonnell & Co.

Q. Who acted for Brown, Bonnell & Co. in the employment of you?

A. Its board of directors.

Q. Acting through whom?

A. Through a resolution of its board.

Q. When was that resolution passed?

A. I guess, at the annual meeting of 1884; if not, by a resolution by direction of all the directors.

Q. Who is president of that corporation now?

A. Mr. Matthews.

Q. This mortgage which you testify about, did it cover anything besides the real estate?

A. No, sir; I believe not.

Q. Brown, Bonnell & Co. at that time had a large amount of bills receivable, had they not?

A. Well, I can say what I suppose; I could not say that I have personal knowledge of it; I suppose they did.

Q. Who was their Western selling agent?

A. John B. Ayer's Sons, Chicago.

Q. And Mr. H. C. Ayer as the Ayer of that firm?

A. He was the Ayer at that time. I think he was the only man in the firm, too, at that time. Prior to that Mr. Henry I. Higgins had been associated with him up, perhaps, to 1882, I should think.

Q. In January, 1883, and in April, 1882, did you know that Mr. Ayer was in danger of failing?

A. I did not. I did not suppose so.

249 Q. As far as you knew, his credit was good?

A. Yes, sir; entirely solvent, and I suppose that his credit was good, and very good.

Q. You supposed that both in April, 1882, when the mortgage was authorized, and also in January, 1883, which you say was the last annual meeting which you saw him at, then?

A. Yes, sir.

Q. Did you hear anything said in January, 1883, about his not having succeeded in negotiating the bonds?

A. I do not remember any other conversation than that which I have related in connection with the mortgage at that time.

Q. The mortgage had been made for some time, but you do not remember anything being said at the January, 1883, meeting about whether those bonds and mortgage had been used, or if they had not, why not?

A. No, sir; I do not remember of anything being said upon that subject at that time, more than the fact that Mr. Eells said that it was in the vault of their bank, and that nobody knew about it but Mr. Colwell and himself. My recollection would be that he emphasized that statement by saying that no director knew with regard to it.

Q. No director of what?

A. Of the bank.

Q. And you say those are all the conversations—the conversations that you have related to Mr. Crawford and myself—that you remember on that subject?

A. That is the substance of all the conversations, because I cannot give the words of a conversation happening so long ago.

250 Q. Did you appear as attorney in those suits in Youngstown wherein judgments were confessed, which judgments are set forth in the intervening petition in this case?

A. Appear as attorney for whom?

Q. That is what I was going to ask you; I do not know.

A. I did appear as attorney.

Q. And for whom?

A. For the creditors.

Q. And at that time you were also employed by Brown, Bonnell & Co. as their attorney at Youngstown?

A. I was in a good many matters—well, I do not know at that time. I do not know that they had any matters that I was then employed in. I do not remember that they had. Possibly they did have.

Q. You were then a director?

A. I was a director; yes, sir; as an individual I was a director.

Q. You were, as an individual, a director in that company?

A. Yes, sir.

Q. And you were their general counsel in Youngstown, were you not?

A. I think at that time it was substantially out of my hands.

Q. What do you mean by out of your hands? In whose hands was it?

A. That is, the management had been assumed by the receiver and he was managing the entire business, and other attorneys were attending to matters.

Q. I am not asking you about the receiver, I am asking about Brown, Bonnell & Co. as a corporation.

A. I am stating about Brown, Bonnell & Co. Other
251 attorneys were attending to the matters of Brown, Bonnell & Co.

Q. What other attorneys?

A. Mr. Clark, at Youngstown, was attending to the matters and was appearing there as attorney of record for Brown, Bonnell & Co.

Q. In those suits?

A. Yes, sir; in those suits; possibly in other matters. I know that he was advising their matters, and still there may have something happened at that time in which I was acting as attorney. I do not now remember of anything.

Q. Then you mean to be understood as saying that at that time you were not advising the board of directors of the corporation of Brown, Bonnell & Co.?

A. I was advising with a portion of the directors at that time. At that time the board was not constituted exactly as it is now. I desire to add to this answer or the former one that subsequently the board of directors by a resolution ratified my action in all those cases.

(By Mr. CRAWFORD:)

Q. Was it not the stockholders?

A. Well, it may have been the stockholders—either stockholders or directors.

252 JOHN I. WILLIAMS, a witness on the part of repondents to intervening petitioners, being duly sworn, testified as follows:

(By Mr. CRAWFORD:)

Q. Please state your name, residence, and occupation.

A. My residence is Youngstown; manager of the Brown, Bonnell & Co. rolling mill under Receiver Brown.

Q. Were you a director of Brown, Bonnell & Co. in January, 1882?

A. I think that was the year that I was elected a director.

Q. Were you present at the stockholders' meeting and at the directors' meeting in January, 1882, of that corporation?

A. My recollection is that I was not at a meeting of the stock-

holders, nor I was not then a member of the board, but was elected and acted as one of the directors.

Q. On that day?

A. On that day; yes, sir.

Q. Do you remember who were present at the directors' meeting on that day?

A. I believe Mr. Stone, Mr. Eells—I think Mr. Stone was there; that is my recollection of it—Mr. Otis, Mr. Ayer, Mr. Jones, and Mr. Matthews, and I am not certain that Mr. Harris was.

Q. Was Ralph Wick there?

A. I do not recollect.

Q. Was there anything said at that meeting with regard to the execution of a mortgage and the issuing of bonds by the corporation? If so, state who conducted the conversation and what was said, as nearly as you remember it.

253 A. All that I can recollect in the premises is that the subject was mentioned, and it was talked of, principally, by Mr. Matthews, Mr. Eells, and Mr. Ayer.

Q. Was the amount of the proposed mortgage specified in the conversation or talked of?

A. I do not recollect of any amount specified at the time.

Q. Was there anything said, and, if so, what, as to whether the mortgage was to be recorded or not to be recorded?

A. I do not recollect that there was anything said on that occasion. It may have been, but I do not recollect it.

Q. Were you present at any subsequent meetings of the board in which that subject was talked of?

A. In 1882?

Q. Yes.

A. Yes, sir.

Q. Were you present at the meeting of the board in April?

A. Yes, sir.

Q. Was there anything said on that subject then?

A. Yes, sir. One of the subjects then was in relation to the mortgage and its execution with a view of raising money.

Q. Was there anything said at that meeting with regard to whether the mortgage was to be put upon record or was not to be put upon record?

A. I can only give the impressions that I got from the general conversation.

(By Mr. BALDWIN:)

Q. If you can state the substance of the conversation you may do that.

254 A. I cannot state the substance of it from recollection, but my impression is that it was for the purpose of raising money to avoid so much discounting, and that the subject of a mortgage on the concern was spoken of, and that it was thought best not to make any record until it was further known as to what could be done. That was the impression I got from the general conversation.

Q. Was there anything said as to whether or not the existence of a mortgage should be kept known only to the directors and concealed from the general public?

A. Just from the general way that I say that it was understood best not to make any note of the matter until it was understood what could be done in regard to a loan.

Q. Were you present at the stockholders' meeting or directors' meeting in January, 1883?

A. Yes, sir.

Q. Was there anything said at that meeting with regard to this mortgage having become a matter of talk?

A. Yes, sir.

Q. Give that conversation, please.

A. I heard Mr. Matthews ask Mr. Eells if he had any knowledge of how the report was abroad in relation to that fact.

Q. What was Mr. Eells' response?

A. He said he could give no reason for it; that no one knew it but himself and Mr. Colwell—that is, in the bank. He spoke with regard to the bank.

Q. Did Mr. Eells state whether he or Mr. Colwell had disclosed the existence of the mortgage or not, or did he deny it?

255 A. I do not know that he denied it or admitted it. He said he could not see how it was possible, as he and Mr. Colwell only, in the bank, knew it. That was my understanding of the matter.

Q. You knew, did you not, that up to that time the mortgage had not been recorded?

A. No, sir; I did not.

Q. You did not know whether it had been recorded or not?

A. No, sir.

Q. Does not this mortgage embrace practically the entire property of Brown, Bonnell & Co. there in Youngstown?

A. I have never read it, but I have so understood it.

Q. In what does that property consist? How many acres are there in the works, about?

A. Between thirty and thirty-four, somewhere along there; thirty-two and some fractions, I think.

Q. Containing what improvements upon it?

A. There are what we call four puddling mills and a variety of finishing mills, nail factory, warehouse, two blast-furnaces, and buildings necessarily wanted in connection with such business.

Q. Office?

A. Yes, sir.

Q. All the fixed machinery?

A. Yes, sir.

Q. The mortgage embraces in substance the entire plant of Brown, Bonnell & Co., does it not?

A. I suppose so, although I have no personal knowledge.

256 Cross-examination by Judge BALDWIN:

Q. Do you know whether the mortgage covers the personal property that they had on hand—the stock?

A. I do not.

Q. What amount of stock is ordinarily on hand in running those works?

A. It varies very greatly. It would run from three to five thousand tons ordinarily of pig metal and iron. As a matter of course there is coal and coke and sometimes ores. It varies very much, as our stock accounts show.

Q. Can you tell about how much—how many hundred thousand dollars, for instance?

A. That would vary according to the price also. At present we have about forty-five hundred tons of pig metal, for instance.

Q. How much is that worth?

A. It is worth on an average fifteen dollars a ton; sixteen dollars a ton probably on the ground.

Q. And what other property?

A. We have some finished iron—probably two hundred tons—muck bar and scrap and such like, running up to a thousand tons, probably—castings, and so on.

Q. Do you know what amount of that you had on hand along at that time?

A. No, sir; I do not.

Q. You cannot tell what the amount of stock was?

A. No, sir.

257 Q. Do you have anything to do with the bills payable or receivable of the corporation?

A. Nothing whatever.

Q. Was there any idea at the time that this mortgage was talked about that Mr. Ayer was insolvent or was going to fail?

A. No, sir; not so far as I knew.

Q. Do you know what the occasion was in the end of the failure of Brown, Bonnell & Co.? It was the failure of Mr. Ayer, was it not?

A. I so understand it.

Q. You say that when that mortgage was first talked of the talk was of raising money by the issuing of bonds on a mortgage instead of raising so much money by discounts at banks?

A. That was the reason given, as I understood it.

Q. And who gave that reason?

A. Mr. Matthews was the one that I principally heard speak in reference to it, in connection with Mr. Ayer and Mr. Eells, principally.

Q. Who had the general financial management of the corporation at that time?

A. Mr. Matthews.

Q. Was he a director at that time?

A. Yes, sir.

Q. Who was president of the corporation?

A. Mr. Ayer.

Q. Did you hear anything said when these bonds and mortgage were being first made about how the money was to be raised on them and where?

A. I cannot say positively, although my impression from
258 conversation was that they were to be placed East.

Q. You understood that they were to be sold East?

A. Yes, sir.

Q. And did you understand that after those bonds were sold East the mortgage was still to be kept off the record?

A. No, sir; I did not.

Q. You say the talk was that it was not wise to record the mortgage?

A. Not at that time; not until they could ascertain whether they could use the bonds. That was my impression. I was not in the secrets of the management financially, but that was my impression.

Q. And were you present at the meeting in April, 1882, when the mortgage was authorized?

A. I do not recollect when the mortgage was first talked of, in my capacity as director. I presume I was present when it was first brought up. I cannot say whether it was in January or later.

Q. When was this meeting you have been testifying about when you heard the talk about making a mortgage? Was that in April, 1882, or January, 1882?

A. I think it was in April when I heard the most of it talked about.

Q. When did you hear next about the mortgage?

A. At a meeting—not at a meeting, but at a time that we were here in Cleveland; during the summer some time; in June, I think.

Q. June of what year?

259 A. Of 1882; the year of the strike. I came up here with Mr. Matthews and Mr. Ayer to hold a consultation with Mr. Stone and Mr. Eells in relation to the financial affairs of the concern.

Q. What strike was it?

A. Strike of the puddlers and workingmen. They made a demand and the manufacturers would not concede it.

Q. It was a strike of your workmen?

A. Yes, sir; it was general among the mills.

Q. What took place then?

A. The subject then came up in regard to the bonds for the purpose of raising money to tide over the strike, which was expected to continue for some time, and at that meeting there were some negotiations between Mr. Eells, Mr. Stone, and Mr. Ayer in relation to those bonds, as I understood it.

Q. What were those negotiations?

A. That they were to advance some money or give their notes for the use of the concern. The particulars—that is, the minute particulars—of the matter I am not sufficiently familiar with to give.

Q. How long was it anticipated or talked of, substantially, that that strike would continue?

A. At that time we thought that it would extend, perhaps, over a month; possibly two months.

Q. And for how long a time was it expected that Brown, Bonnell & Co. would need this assistance from those gentlemen?

A. I do not know that that question was brought up.

Q. It was said that they were requested to help the corporation so as to tide over the strike?

A. Yes, sir.

260 Redirect examination by Mr. CRAWFORD:

Q. Was there anything said at that meeting as to what the effect upon the credit of Brown, Bonnell & Co. would be if this mortgage was recorded?

A. It was expressed as an opinion that it would not be advisable to record it.

Q. Was there anybody that expressed a contrary opinion in that interview?

A. None that I am aware of.

Q. Who expressed that opinion? Was it not Mr. Eells?

A. Mr. Ayer is the one that I recollect most distinctly. It was not objected to by anybody.

Counsel for respondents to intervening petitioners offered in evidence the minute book of Brown, Bonnell & Co., especially that portion with regard to the action of the stockholders and directors taken in January, 1884, approving the confession of judgments.

Objected to by counsel for intervening petitioners. Received subject to exception.

Counsel for respondents to intervening petitioners offered in evidence the official report of the receiver of Brown, Bonnell & Co., showing the appraisal of the property of Brown, Bon-

261 & 262 nell & Co., to which is attached a sworn inventory.

Counsel for the respondents to intervening petitioners stated that the offer was for the purpose of showing that the corporation was not insolvent at that time and is not insolvent to-day, and also for the purpose of showing the value of the assets of the corporation and the schedule of property owned by the corporation.

Objected to by counsel for intervening petitioners. Received subject to exception.

263 FEBRUARY 9, 1885.

F. H. MATTHEWS, being sworn, testifies as follows:

(By Mr. CRAWFORD:)

Q. Please state your residence and occupation.

A. My residence at present is in Chicago; occupation, harvester business.

Q. Were you ever connected with the corporation of Brown, Bonnell & Co.; if so, in what capacity and at what time?

A. I was connected with the corporation of Brown, Bonnell & Co.

as vice-president and treasurer from September, 1879, to February, 1883.

Q. Were you present when Mr. Herbert C. Ayer signed and acknowledged the alleged mortgage upon the property of Brown, Bonnell & Co. to Eells and Hay, trustees?

A. I was.

Q. Please state, according to your best memory, the circumstances under which this mortgage to Eells and Hay, trustees, was first determined upon by the directors or stockholders of the corporation.

Objected to. Answer taken subject to exceptions.

A. At the annual meeting, which occurred in January, 1882, there were present Mr. Ayer, Mr. Stone, Mr. Eells, Mr. Otis, Mr. Harris, Mr. Williams, Mr. R. J. Wick, and myself. I think that was all. Mr. Ayer stated to the stockholders that were present at that time
264 that he had been carrying Brown, Bonnell & Co. to the extent of two or three hundred thousand dollars for some time, and that he could not continue to do so, and that he thought it would be advisable that Brown, Bonnell & Co. should execute a mortgage on their property and issue bonds to the extent of $500,000, and dispose of them in order to raise sufficient money to relieve him from that load and furnish them with what capital might be necessary to continue their business. The matter was discussed between the different parties, and Mr. Eells said at that time that he did not think these bonds could be sold, from the fact that the money market at that time was in such a condition that it would be almost impossible to dispose of bonds of that kind. Bonds, he said, of all kinds were very difficult to sell, and capitalists were looking then with a good deal of distrust upon all investments of that sort. Then Mr. Stone remarked that it might be a good thing to have this mortgage and these bonds prepared, passed upon by the board of directors, and got all ready, so that in case an opportunity did offer for their being sold they would be in shape to take advantage of it, or in case they did not sell them or could not sell them they would be very handy to use as collaterals to secure loans at any time that such accommodations might be wanted; and it was also suggested at that time, I think I made the suggestion, that in case anything of that kind was done it would be necessary to keep the matter entirely private, at least until we got into shape where the bonds could be sold, because if we should execute a mortgage and put it upon record at that time, even if we did not issue a single bond, it would act as a means of throwing discredit on the
265 corporation. This was admitted by all who were present, and it was agreed then that the whole papers—bonds, mortgage, and everything—should be prepared, and that after they were prepared there should be a meeting of the directors called, who would pass upon them, and that in the meantime nothing was to be said about —; it was to be kept entirely quiet. That was, I think, about all that was said at that time in regard to it, except that Mr. Stone drew up a form in which the bonds should be issued; so many of them to come due in two years, so many in three,

and so on. Mr. Stone himself suggested the method in which the bonds should be issued or gotten up. Then after that we went ahead and got up the material for preparing the mortgage and had the mortgage prepared, and a form for the bonds was drawn up, and I think on the third of April there was a meeting of the directors called, and the mortgage was authorized by this meeting. The mortgage, however, was not executed at that time. It was finally completed some time during the month of June succeeding.

Q. Do you remember a meeting which took place at Mr. Stone's house, in Cleveland, shortly before Mr. Ayer signed this mortgage?

A. Yes, sir.

Q. Please state who were present at that interview, how it came to be held, and what was transacted thereat.

A. Mr. Ayer telegraphed me from Chicago to meet him in Cleveland some time early in June of 1882. Just the exact day I do not remember. I met him here. I do not remember exactly the details, but I think he had arranged to meet him.

266 Q. Mr. Stone was ill, was he not?

A. Yes; Mr. Stone was not able to be out. He had arranged a meeting with Mr. Eells, Mr. Harris, and Mr. Stone. Mr. Otis, I think, was not in town at that time. I think he had gone to Europe. We went up to Mr. Stone's house. There were present Mr. Ayer, Mr. Eells, Mr. Stone, and myself. Mr. Ayer stated that the mortgage and bonds were all now ready to be executed—all it needed was his signature to complete the mortgage—and that he had arranged to have this mortgage sent down to New York, where he was going, by Mr. Jones, who was the secretary of the company, and he would sign and acknowledge the mortgage there; that the condition of affairs was such at that time, owing to the strike that had occurred on the first of June, that they were not producing anything or selling anything and had no means of obtaining any money out of their manufacture; that they had liabilities to meet during the summer months, which would come due while this strike would probably last, and that it would be necessary to make some arrangements for raising money to carry the mill through this strike until it should be ended and the mill get to work again manufacturing and selling iron; and he asked these gentlemen what they would do or what they would be willing to do in order to effect this purpose; whether they would be willing to take the bonds and advance money on them or whether they would prefer to endorse Brown, Bonnell & Co.'s paper for a sufficient amount to accomplish this purpose. Mr. Stone spoke up and said that for his part he did not want to take the bonds. He did not want to buy bonds, in other words. He said that he had no money that was loose

267 at that time that he could put into any investment of that kind, and even if he had he did not know that he would be willing to do it; that he had a good many calls on him from other institutions that he was connected with; was having considerable trouble at that time to carry out his different schemes that he was interested in, and that he had no money to spare; but he said he would be willing to endorse Brown, Bonnell & Co.'s paper to the ex-

tent of $50,000 and take the bonds as security at the rate of two for one; in other words, to take $100,000 of the bonds as security for his endorsement to the extent of $50,000. Mr. Eells said he would do the same thing. Mr. Harris said he would do the same thing. Mr. Ayer said he would also do that. Then the arrangement was that Mr. Ayer and I were to go down to New York; that he would sign and acknowledge the mortgage there; that I was to bring it back and take the mortgage and bonds and deposit them with Mr. Eells, who was one of the trustees named in the mortgage. Then that I would arrange to get this paper fixed up and have it endorsed by the different parties. Mr. Ayer and myself, after this arrangement was made, went to New York.

Q. Before you go to that please state whether anything was said at that meeting, and, if so, what and by whom, as to whether or not this transaction was to be made public and the mortgage put upon record or whether it was not.

A. So far as I can recollect, there was not a great deal of conversation in regard to that subject. It seemed to be definitely
268 understood by all parties that the mortgage was not to be placed on record. The talk in regard to it was that as soon as the mill got in operation again we would be able to take this paper up; that it was merely a temporary expedient, and that there would not be any trouble about the mill—when it once got started again—meeting its obligations, paying off this paper, and retiring the bonds—taking back the bonds—so that there would be no necessity of having it recorded. I think that that was the understanding at that meeting in regard to that matter. Mr. Ayer and myself went to New York city. The mortgage was sent down there by Mr. Jones, the secretary, who had signed and acknowledged it. Mr. Ayer took it with me around to a notary's office on 23rd St., New York, who was also, I think, a commissioner of deeds for the State of Ohio, and in his presence signed the mortgage and acknowledged it. I brought it back to Youngstown, took the bonds and the mortgage up to Cleveland, and deposited them with Mr. Eells. I had the paper prepared to the amount of $200,000, $50,000 payable to the order of each of these gentlemen: Amasa Stone, Dan. P. Eells, Colonel Harris, and Mr. Ayer. They endorsed—each of them—the notes that were drawn to their order, and I gave orders on Mr. Eells for the bonds to each one of these parties, I think, at that time, except Mr. Ayer. Mr. Ayer did not take any of the bonds.

Q. Do you remember a later conversation which occurred at the house of Mr. Stone in September concerning this same subject-matter? If so, please state the particulars of that interview, who were present, and what was said.

269 A. There was another interview that I remember, just the exact date of which I cannot state. I am not certain now whether it was at the bank or at Mr. Stone's house or whether there were two. It seems to me that there were two; one at the bank and one at Mr. Stone's house. I remember that there was an interview after Mr. Otis got back from Europe at which Mr. Otis was present, and what had been done in regard to the matter was talked over so that

he would know just what the circumstances were, and Mr. Otis agreed at that time to also come in and endorse $50,000 of paper, and he was to have his security, and it was arranged so that each party should hold about $80,000 of bonds instead of one hundred thousand dollars. The three parties who already had the bonds were to give up twenty thousand dollars of their bonds to Mr. Otis, and the additional $20,000 was made up out of bonds that had not been used.

Q. Do you remember a conversation that took place either at Mr. Stone's house or at the Commercial Bank, at which Mr. Colwell and others were present?

A. Yes, sir.

Q. State that interview and what was the occasion of it.

A. That interview was at the Commercial National Bank in January, 1883. The occasion of it was an application that I had made to the bank for the discount of some paper of John V. Ayer's Sons, endorsed by Brown, Bonnell & Co. It was at a meeting of the board of directors of the Commercial National Bank. Mr. Colwell was there; Mr. Stone was there; Mr. Otis was there; Mr. Eells was not there. Mr. Boardman was there, I think, and one or two
270 others of the directors of the bank. Mr. Colwell had been talking with them, and he had also before that talked with me, on the subject of recording this mortgage. He wanted to have it recorded.

Q. Let me ask you whether at that time Brown, Bonnell & Co. were indebted to the Commercial Bank for any discounts?

A. Yes, sir; they were.

Q. How much?

A. Somewhere in the neighborhood of sixty or seventy thousand dollars.

Q. In January?

A. In January; yes, sir.

Q. And this was a request for a further discount?

A. For a further discount. There were notes coming due during the month of January which we expected to be paid—during the month of January and early in February.

Q. Had they at that time any claim of hypothecation of any kind of any of these securities?

A. They had. They had, I think, $150,000 of these bonds. They held them as security for discounts and loans. Mr. Colwell had said to me that he thought that mortgage ought to be recorded; that he was afraid that trouble would come from it if it was not; that he had never known a case of that kind, where a mortgage had been held off of record, that did not result in trouble; that he had himself been interested in a case once before somewhat similar to that, in which a mortgage had been held off of record and trouble had come from it, and he was very strongly in favor of having the mortgage recorded then.

Q. Are you giving now a statement that he made at that meeting?

271 A. No; that is what he had said to me before. He had laid this discount matter before the board of directors, and I was

called in before them, and they—Mr. Stone, I think, being the spokesman—said that they thought the mortgage ought to be recorded, and that they did not know whether they would discount any more paper for me or not without doing that. I said to them just like this: "Gentlemen, if that mortgage is recorded it will defeat the very purpose that you have in view, because it will place Brown, Bonnell & Co. immediately in such a position, taking into account the times as they are, that it will be impossible for them to borrow any money, to get any more paper discounted, and people at once would begin to think that something was wrong, seeing this mortgage on record. We are doing a large amount of business now, and we expect to be able to take up this paper that is secured by these bonds as fast as it matures, and if the mortgage is placed on record we will be stopped from doing that, and it will defeat the very object that you have in view." Mr. Stone then asked me to step out of the room, and said that they would talk the matter over and see what conclusion they would come to. After talking the matter over they called me back again, and Mr. Stone said that they had determined, in view of the case as it stood, that they would not insist upon the mortgage being recorded; that they would allow it to stand just as it had been; that they would discount the paper for me at that time, but that I was to agree with them that if anything should turn up which would indicate that things were going wrong, that would make it necessary for that mortgage to be recorded in order
272 to protect their interests, they should be immediately notified in time so that they could put the mortgage on record. I told them that of course that would be done.

Q. Is that all of the interview?

A. Yes, sir.

Q. Mr. Ayer, the president of the corporation, was not there at that interview?

A. No, sir; he was not at that meeting.

Q. Did you communicate that to him?

A. I did.

Q. Orally or in writing, or both ways?

A. I suppose both ways. I wrote him about it, and I suppose I told him about it, because I saw him very frequently.

Q. Up to that time had you disclosed the fact of the existence of this mortgage or the fact that these bonds had been hypothecated among the directors and the Commercial National Bank to anybody?

A. I had to one person only, and that was in order to make a loan from this person, which I did make.

Q. That person was who?

A. Harvey Brown, a son of Fayette Brown.

Q. Was that the only person that you ever had any transactions with to whom you disclosed the existence of it?

A. That was the only one.

Q. Did you make any suggestion or request or demand from him as to his keeping the matter a secret?

A. I did. I requested him to keep it perfectly secret, not to let

anybody know anything about it, because we expected to take
273 up all of this paper that was secured by these bonds and retire the bonds, and never have the mortgage recorded unless we at some time concluded to, being in shape to sell them.

Q. He knew that the mortgage was kept off of record, did he?

A. Yes, sir; he did.

Q. Were you having, during the period intervening between April and January, when this conversation was held, large financial transactions, in the way of borrowing money, in the banks at Youngstown and the surrounding country in the valley there?

A. Yes, sir; very large transactions.

Q. Did you disclose to any of those persons who were having relations with the company and becoming its creditors during this period the existence of this mortgage?

A. I did not.

Q. Do you remember a conversation that was had at the annual meeting in January, between yourself and Mr. Eells, with regard to the fact of the existence of this mortgage having leaked out somewhere or somehow?

A. I do; yes, sir.

Q. State what that was.

A. At this annual meeting, which occurred in January, 1883, at which Mr. Eells was present, I remarked that by some means or other certain parties had got an inkling or a suspicion that a mortgage had been authorized by Brown, Bonnell & Co., and that bonds had been gotten up under that mortgage and used in some kind of a way, they did not seem to know exactly how, and I asked him if he had any idea how that thing had gotten out. I told him that I never had mentioned it to anybody except this party that I
274 speak of, and that I could not see for the life of me how anybody had got any suspicion in regard to the matter; asked him if he supposed it could have got out in any way through the bank. He said he did not think so; he did not know; he did not see how it could have. He said he knew he never had said anything about it and he was certain Colwell never had, and he did not think there was anybody about the bank that knew anything about it except himself, Colwell, and his son Howard, and he was certain that none of those three had said anything about it, nor none of the directors.

Q. Do you know whether or not Mr. Harvey Brown has intimate business relations with the Commercial National Bank of this city?

A. He keeps a bank account there, or did at that time.

Q. Do you know whether his father, Mr. Fayette Brown, is a director in that bank?

A. Mr. Fayette Brown is a director in that bank—yes, sir—or was at that time. I suppose he is yet.

Q. What were the financial or business relations between the house of John V. Ayer's Sons, of Chicago, and Brown, Bonnell & Co.?

A. The relations were just this: Mr. Herbert C. Ayer was John V. Ayer's son, and he was also president of Brown, Bonnell & Co. and the largest stockholder. The great bulk of the iron manu-

factured by Brown, Bonnell & Co. was shipped on orders sent Brown, Bonnell & Co. by John V. Ayer's Sons; so that almost all the business that was done by Brown, Bonnell & Co. was done through John V. Ayer's Sons.

Q. Was it done for cash or on time paper?

A. Almost entirely on time paper.

Q. Had that been the course of business during the entire time that you were connected with the works there?

A. Almost entirely.

275 Q. Was it known to the directors of the company—Eells, Harris, Stone, Otis, and others?

A. Yes, sir.

Q. How much of the paper of John V. Ayer's Sons had the corporation of Brown, Bonnell & Co. endorsed and rediscounted in January, 1883?

A. Do you mean the whole amount that was out at that time?

Q. Yes; of John V. Ayer's Sons' paper.

A. Somewhere in the neighborhood of $800,000.

Q. What effect would the suspension of the house of John V. Ayer's Sons have on the corporation?

A. The effect it did have was to cause its immediate suspension.

Q. Was it known to the directors of Brown, Bonnell & Co. that their relations were such that it would necessarily have that result?

A. I suppose it must have been.

Q. Do you remember when this mortgage was recorded?

A. It was recorded on Saturday afternoon, the day that John V. Ayer's Sons failed; I think February 17th.

Q. Were you at Youngstown that day?

A. I was; I got a telegram from Howard Eells.

Q. At what time?

A. About noon.

Q. Howard P. Eells, son of Dan. P. Eells, the trustee?

A. Yes, sir.

Q. What did he say?

A. He said that Mr. Colwell would leave for Youngstown on the eleven o'clock train and to assist him all I could.

Q. Did Mr. Colwell come to see you?

276 A. Mr. Colwell came into the office about half past two or three o'clock Saturday afternoon.

Q. How long was that before the receiver was appointed?

A. The receiver was appointed on the following Tuesday.

Q. What did Mr. Colwell say?

A. Mr. Colwell said he had come down to record that mortgage; that he had left it at the recorder's office and came over to see me in regard to the matter; said that they had got a telegram from Mr. Ayer that morning to record the mortgage, and that he had immediately come down to do so, and that he had also learned that John V. Ayer's Sons had gone to protest in Chicago that day. He said he was very sorry for it, and thought that perhaps some arrangement might have been made, if it had been got at in time, to have fixed the matter up in such a way that it would not have been necessary.

Q. Did Mr. Colwell state that he had that information with regard to the failure of John V. Ayer's Sons before he left Cleveland?

A. I think he did.

Q. Before the mortgage was recorded?

A. Yes, sir.

Q. Was there ever any order of the board of directors authorizing the sale of these bonds?

A. There was not.

Q. Was there ever any order of the board of directors authorizing the hypothecation of these bonds?

A. There was not.

Q. Was there ever any order of the board of directors authorizing the giving of these orders which were given?

A. There was not—no formal order.

277 Q. The only authority for it was the conversations which you have up to this time stated in your deposition?

A. Yes, sir; the instructions of the president and the conversations with the directors individually.

Q. With regard to the hypothecation to themselves?

A. Yes, sir.

Q. Were you interested to the extent of a cent in any of these transactions?

A. No, sir; except as member of the corporation.

Q. State whether the paper that was given in June, on which these orders were based, was or was not paid when it matured.

A. It was paid.

Q. Absolutely?

A. Yes, sir.

Q. Were there ever any new orders given?

A. No, sir; no new orders given.

Q. State whether or not the paper upon which Mr. Eells, Mr. Otis, the Stone estate, and Mr. Harris are now responsible as indorsers or which they have lifted as indorsers was or was not new paper, executed along in the very last of the year.

A. It was new paper.

Q. Executed after the mill had gone to work and the strike was all over?

A. Yes, sir.

Q. Did you, as chief executive officer, have charge of the financial business of Brown, Bonnell & Co.?

A. I did, sir.

278 Q. Outside of the $800,000 of liability of Brown, Bonnell & Co., as endorsers of John V. Ayer's Sons' paper, about how much debt was there of Brown, Bonnell & Co. on contracts for the delivery of material and also on discounted paper of its own at the time of the failure?

A. Somewhere in the neighborhood of $400,000.

Q. Making a total indebtedness of about $1,200,000?

A. Somewhere between $1,200,000 and $1,300,000 there was altogether.

Q. What officer of Brown, Bonnel & Co. personally managed these

transactions and made these loans, purchases of material, and discounts of paper?

A. I did.

Q. So that you were personally brought in contact of every one of those creditors, were you, at the time these debts were created?

A. Yes, sir.

Q. How many of them were created after the date of this mortgage that was kept off of record or after this June meeting?

A. A very large proportion of it; almost all, in fact.

Q. Did you have any conversation with any creditor of Brown, Bonnell & Co. at the time you were creating in behalf of that corporation a debt for discount or rediscount of the purchase of material about the existence of this mortgage or the hypothecation of these bonds to secure indorsements of the directors? If so, state what you did say to them.

A. I never suggested, of course, to anybody that there was a mortgage on the property or that a mortgage ever had been au-
279 thorized. If I had I should certainly have defeated the very object for which I was going.

Q. You did not state, then?

A. No; I did not.

Q. Neither by suggestion or statement?

A. By suggestion or in any other way. I did have one conversation in regard to the matter. That was with the president of the First National Bank of Youngstown. He brought the matter up himself.

Q. About what time?

A. That was in January, 1883. That was the matter that I referred to when I was talking with Mr. Eells.

Q. Is that the only conversation of any kind that you ever had with any creditor of Brown, Bonnell & Co. in which that subject was alluded to?

A. The only conversation.

Q. What would have been the effect on the corporation of Brown, Bonnell & Co. in June, 1882, taking all of the circumstances then existing into account, had it not been for the raising of this $200,000 from the directors, as you have indicated?

Objected to. Answer taken subject to exception.

A. The effect would have been that Brown, Bonnel & Co., having large liabilities coming due the time that this strike was in existence, would have been unable to meet their obligations, from the
280 fact that they were doing no business and disposing of no goods, and had no means therefore of obtaing money in any other way, and would probably have been obliged to suspend payment.

Q. When did the strike begin?

A. June 1, 1882.

Q. How long did it last?

A. It lasted about three months.

Q. During that time were the mills closed?

A. They were.
Q. No work at all?
A. No work at all.
Q. During those three months was there any amount of negotiable paper of Brown, Bonnell & Co. outstanding and maturing during that period; if so, about what amount?
A. There was considerable paper, but the amount I am not prepared to state just now. I could not state that.
Q. Was it a large amount or a small amount?
A. A very considerable amount.
Q. Except by making some loan amounting to $200,000 or thereabouts, had the company any property or assets by which it would have been enabled to meet those maturing obligations during the time of that strike?
A. No, sir; it had not.
Q. There were a good many stockholders, were there not, of Brown, Bonnell & Co. other than the directors?
A. Several others; yes, sir.
Q. Did you ever disclose to those people who owned stock in Brown, Bonnell & Co. and who were not members of the board of directors the existence of this mortgage or the hypothecation
281 of those securities to the directors?
A. I did not.
Q. Was this mortgage or the issue of these bonds ever authorized by any vote of the stockholders?
A. It was not.
Q. Do you know whether or not any of the stockholders other than those that were members of the board of directors ever knew about the existence of this mortgage or these bonds?
A. Not to my knowledge.

Cross-examination by Mr. C. C. BALDWIN:

Q. You say you were vice-president and treasurer of Brown, Bonnell & Co. from September, 1879, to February, 1883?
A. I will correct that a little. I was treasurer from that time, but I was not vice-president until January 1, 1883. I think that was the date that I was elected vice-president. It was at the time that Mr. Rhodes went out. Mr. Rhodes went out shortly before that.
Q. State what share you had in the management of the business during those years.
A. I had the management of the finances and the superintendence of the office work and accounts, sales, and contracts, purchases of material, etc., under the direction of the president.
Q. Then I understand that the president and yourself had charge of the finances and general charge of the business.
A. Yes, sir.
Q. How often did the president and yourself seek the advice of the directors?
282 A. Do you mean as a board or individually?
Q. As a board.

A. I do not know that I can answer that question exactly. We had an annual meeting once a year and occasionally a called meeting, but not very often did we ever call the board together as a board. We had an executive committee, which was authorized to act during the intervals of the sessions of the board, that we sometimes called together.

Q. Do the meetings of the board of directors appear on the records?

A. Yes, sir.

Q. Who composed the executive committee?

A. Different parties at different times. What time do you mean?

Q. Who were the executive committee in 1882?

A. Mr. Ayer, myself, Mr. A. W. Jones, Mr. Charles A. Otis, and the fifth one I do not recollect now. There were five.

Q. How often did the executive committee meet?

A. They had no regular times for meeting.

Q. Where did they meet?

A. Met at Youngstown.

Q. Was there any record kept of their proceedings?

A. Not very often. As a rule there were no records kept of the meetings of the executive committee. Once in awhile there were, when anything of importance was transacted.

Q. Where are those records, such as they are?

A. They are contained in the book of records, whatever records there are. There are no other records.

Q. No other records than that one book that is here?

A. No, sir.

283 Q. How often did that executive committee meet?

A. As I stated before, they had no regular time of meeting. I do not know that I can remember how often they did meet. They did not meet very often.

Q. How often did Mr. Otis meet with them?

A. I think not more than once or twice; twice, probably.

Q. At the meeting in January, 1882, did Mr. Ayer say anything in regard to where he expected to sell the bonds?

A. No, sir; he did not. He had no idea where he could sell them, as far as I remember.

Q. Do you not remember that there was some talk that Mr. Ayer might be able to sell those bonds East?

A. No, sir; I do not. I remember his asking Mr. Eells if he did think he could place them in New York. Mr. Eells replied that he did not think that under the circumstances and at that time it could be done.

Q. Was Mr. Ayer present at the meeting at Mr. Stone's house that you have told about?

A. Yes, sir; he was.

Q. Did you go to New York with Mr. Ayer?

A. I met him in New York. I am not certain whether I went with him or whether I met him.

Q. You do not remember, then, whether you left here and went with him?

A. No; I am not certain whether I left Cleveland and went with him or whether I went down to Youngstown and went from there to New York and met him.

Q. How long did Mr. Ayer remain in New York on that occasion?

284 A. I think he was there about a week.

Q. Why was that mortgage sent to him down there to be executed in New York?

A. I cannot remember now why it was sent there; I do not know.

Q. Did Mr. Ayer go to Youngstown on his return?

A. I think not.

Q. Did he return to Chicago?

A. I think he did.

Q. Was it not the fact that Mr. Ayer did not know but that possibly he might find somebody in New York at that time who would buy those bonds?

A. I do not think so. I do not think he made any attempt to sell the bonds at all while he was there. He did not to my knowledge.

Q. Who brought the mortgage back?

A. I think I brought it back.

Q. Are you sure?

A. I am pretty sure I did.

Q. How long did you stay down there?

A. I stayed there two or three days.

Q. Did you go down there to carry that mortgage there?

A. No, sir.

Q. Were the bonds down there?

A. The bonds were not there; no, sir.

Q. You did not understand that it was expected that if those bonds should be sold to outside parties the mortgage should be kept off the record?

A. No. If the bonds were to be sold, of course the mort-

285 gage would necessarily be recorded.

Q. You say Mr. Ayer was present at the meeting at Stone's house in June, 1882?

A. That is my remembrance of it.

Q. Was any talk had at that meeting in June, 1882, about how long the strike would last?

A. I cannot remember about that.

Q. As a matter of fact the strike lasted a great deal longer than you expected, did it not?

A. Yes; it did last some longer—not a very great deal longer—than I expected. I imagined it would be over in about sixty days at that time.

Q. Did you suppose at that time it would be necessary to have any permanent loans under the arrangement made there?

A. I did not; no, sir.

Q. Do you know to what extent these parties had indorsed during June, 1882?

A. They indorsed $50,000 each.

Q. How many were there of them that indorsed that?

A. There were four indorsements at that time. Mr. Ayer, Mr. Stone, Mr. Eells, and Mr. Harris had endorsed $50,000 each at that time, making two hundred thousand dollars.

Q. How soon did Mr. Otis endorse his $50,000?

A. It was after his return from Europe. I think it was in December.

Q. Do you remember how long that paper ran which these other parties endorsed?

A. Yes, sir; four, five, and six months.

286 Q. Do I understand you to say that when the paper which they then endorsed was paid they were under no liability by way of endorsement for the company?

A. No, sir; I did not say so. I said that that paper was all paid.

Q. I will ask you when they made the next endorsements.

A. When the first note came due in October I got new notes from Mr. Eells, Mr. Harris, & Mr. Stone for a less amount than the amount falling due. The note falling due, I think, was $12,500. I cannot remember the exact amount, but I know the amount of $50,000 was divided up into three payments, and I think two notes in each payment falling due about the same time—two notes falling due in October, two in November, and two in December. I got notes from them for a less amount than the notes falling due in October, and they discounted and took up the notes that were given in June.

(By Mr. CRAWFORD:)

Q. State whether you got them discounted at the same place where the old ones were paid or new discounts at new places.

A. In some instances the notes were discounted at the same place where the old ones were and in other cases not—just wherever I could get them discounted. Just wherever I happened to have an opening I put them in. In some cases the notes were discounted at places that never had discounted but the one that was discounted at that time.

(By Mr. BALDWIN:)

Q. That is the second discount?

287 A. The second discount; yes, sir. In November the same thing was repeated; so that the amount of $50,000 which was originally indorsed by these parties was reduced, I think, to $37,500. $12,500 had been paid on each one of those endorsements.

Q. Were new notes continued to be taken in that way to raise the money to take up the old paper?

A. Yes, sir.

Q. And sometimes, you say, you got the new money to take up the paper at the same place where the old was and sometimes not?

A. Sometimes not, just depending on where I could have an opening.

Q. Where did you in the main get the money?

A. Oh, I got it in a great many different places. I had discounts at twenty or thirty different banks—some in New York, some in Cleveland, some in Youngstown, some in Sharon, Pa., some in

Uniontown, Pa., some in Pittsburgh, some over in Ravenna, some at Greensburg, Pa., and some at other places.

Q. How much of the capital stock did Mr. Ayer own in June, 1882?

A. About a million.

Q. Did you have any previous knowledge that Mr. Ayer's concern was going to fail in February, 1883?

A. I did not.

Q. Did you have any suspicion of it?

A. No, sir. Mr. Ayer had told me less than two weeks before that time that he was all right and would go through—would be able to meet his obligations.

Q. What do you think, on reflection, about whether or not
288 you did have a second interview at Mr. Stone's house? What is your best recollection about that?

A. My recollection is that we did have a second interview at Mr. Stone's house.

Q. When was it?

A. I am a little mixed about that. I cannot say the exact date, but it strikes me it was some time after the strike had closed; perhaps in September or October.

Q. Who were there?

A. Mr. Stone, myself, Mr. Ayer; I think Mr. Eells and Mr. Harris. Mr. Eells I am certain was there, but I am not certain about Mr. Harris.

Q. How is it about Mr. Otis? Was he there?

A. Mr. Otis was not there.

Q. Do you say Mr. Ayer was there or not?

A. I think he was; yes, sir.

Q. When was the first interview that you had at the Commercial Bank?

A. The first interview we had was before the first interview that we had at Stone's house. I think Mr. Ayer and I met Mr. Eells at the bank, and he said that Mr. Stone was not well, and that we had better make an appointment to meet Mr. Stone at his house.

Q. You said on your direct examination that you remembered an interview when Mr. Colwell was present in January, 1883.

A. Yes. That was toward the latter part of January; I
289 think the last of January.

Q. Where was it?

A. That was in the banking office; that was a meeting that I had there with the board of directors of the bank.

Q. Then the interview which you spoke of as being an interview at the bank when Mr. Colwell was present was the interview when you made an application to the board of directors for further discount?

A. Yes, sir; Mr. Colwell, of course, knew all the circumstances of this thing, because he was cashier of the bank, and we were doing business with the bank, had money borrowed from there, and they held a part of the collateral.

Q. Then I understand that from the time those endorsements

were made in June, 1882, until the failure of Brown, Bonnell & Co. these parties were under liability as indorsers?

A. Yes, sir; they were.

Q. You say you had no knowledge or expectation of the failure of Mr. Ayer clear down to the time it was made?

A. No, sir; I had not. The first intimation I had of it was the filing of this mortgage, and it surprised me as much as it did anybody.

Q. It seems that when these parties endorsed that paper in June, 1882, you thought and represented to them that the matter would be merely temporary?

A. That was what was my expectation; that was the expectation of everybody—that it would be merely a temporary matter, and that the paper would all be taken up and the bonds retired, never used at all.

290 Q. You say the strike continued longer than you expected?

A. Yes, sir; continued longer than we expected.

Q. Did you down to the time of the failure of Brown, Bonnell & Co. have any other expectation than that which you had in June, only the time was lengthened?

A. No, sir; I had no other expectation. I expected that those notes would all be taken up that spring; that was what I was calculating on and hoped to be able to do it, too, if circumstances had not downed it.

Q. When did you first learn that anybody had learned about this mortgage? As I understand it you never heard of it but once.

A. That is all.

Q. And that was the talk you had with the president of the First National Bank of Youngstown?

A. It was just a few days before the annual meeting in January, 1883; probably three or four days before.

Q. Do you know on what day of the month the annual meeting was in January?

A. January 16.

Q. Who was the president of the First National Bank of Youngstown?

A. Robert McCurdy.

Q. Tell us what that conversation was with Mr. McCurdy.

A. Mr. McCurdy said to me that a gentleman from Cleveland—he did not mention who it was, although I had an idea who it was—had said to him that he had understood that Brown, Bonnel

291 & Co. had issued bonds on their property and had hypothecated them—borrowed money on them—and he wanted to know whether we had ever issued any bonds or not. I told him we had not; that I did not know what we might have to do, but that Brown, Bonnell & Co. had never issued any bonds; that was the substance of the conversation.

Q. Did he say anything about a mortgage?

A. I do not think he did. That is my recollection of it.

Q. What position did you occupy with this corporation after February, 1883?

A. I still occupy the same position I had previous to that.

Q. You were still vice-president and treasurer?

A. Yes, sir.

Q. State what position you occupied under the receiver.

A. I was acting as the receiver's agent.

Q. Do you remember when those judgments were confessed in Youngstown in behalf of various creditors of Brown, Bonnell & Co.?

A. It was in September or October, 1883. October, I think.

Q. Who acted in that matter as the agent of the corporation authorizing the confessions of judgment?

A. H. C. Ayer, the president.

Q. What part did you have in it?

A. I do not know that I had any particular part.

Q. You did not have anything to do with it?

A. I did not say that.

Q. What did you have to do with it?

A. I went around and saw the parties, most of them; told them about it; got them to place their accounts in the hands of A. W. Jones. That is about the size of it.

Q. That is, you got them to place their matters in the
292 hands of A. W. Jones for the purpose of having those judgments entered by confession?

A. Yes, sir; got "bounced" for doing it, too.

(By Mr. CRAWFORD:)

Q. You mean "bounced" by the receiver?

A. Yes, sir.

(By Mr. BALDWIN:)

Q. What interest had you in getting these parties to put their claims into judgment by confession?

A. No particular interest, except to get the matter, as I thought, settled up as quickly as possible.

Q. How did you propose to have the matter settled up?

A. I did not propose.

Q. How did you expect it was going to be settled up?

A. I did not know.

Q. Had you heard no talk about it?

A. I had not heard any talk that was final or conclusive or satisfactory to me as to the method that was to be pursued.

Q. What plan was in contemplation?

A. That I cannot say. I do not know. I was not in the secret.

Q. But you did go around and get these parties to put their claims into judgment by confession?

A. Yes, sir; some of them I did not get.

Q. What reasons did you give them for doing that? What plan did you give to them? For instance, you got Mr. Robert McCurdy to do that, did you not, for one?

A. No, sir; I did not. I never said a word to Mr. McCurdy about

it. I never spoke a word to him on that or any other subject from that time to the present day. He came in of his own accord.

(By Mr. CRAWFORD:)

Q. Glad to get in, too, was he not?

293 A. Yes; he was.

(By Mr. BALDWIN:)

Q. Did you not, as agent or vice-president or as an officer of the corporation, confess a lot of judgments in December, 1883?

A. I think I did; a few small ones.

Q. You say that in October, 1883, you got those creditors to place their claims in the hands of Jones to have those judgments confessed?

A. Yes, sir.

Q. You were at that time in the possession of the property under the receiver, were you not?

A. I was acting as the receiver's agent.

Q. You had the general management, did you not, of the business?

A. Yes, sir; under the receiver.

Q. And the control of the property?

A. Under the receiver; yes, sir.

Q. Was it a part of the plan that you were to turn the property out to be levied on on those judgments?

A. No, sir.

Q. Who requested you to see those parties for that purpose?

A. Mr. Crawford.

Q. What did he tell you about the plan to be pursued?

A. He did not tell me anything.

Q. Did he not represent to you that those judgments would be liens on the mill property?

A. He represented to me that in the event of the receiver being discharged the judgments would then become liens on the mill.

Q. Did he not tell you that if the property was handed over from the receiver—if the sheriff took possession of the property—

294 his plan was to go on and force the judgments by force?

A. No, sir; never told me that.

Q. But you understood that he expected to wait until he had defeated the jurisdiction of the receiver in this suit?

A. That is what I understood; yes.

Q. Did you not understand that those judgments were to be executed at once or within a short time?

A. No, sir; never understood anything of that sort. I knew too much about law myself for that.

Q. You were yourself appointed receiver, were you not, under those judgments in Youngstown?

A. Yes, sir.

Q. Was that before or after you were "bounced?"

A. It was after I was "bounced."

Q. Are you certain of that?

A. I am pretty certain of it; yes. Of course, I expected to be "bounced" when I went into it. I was not disappointed, either. Mr. Crawford thought I would not be, but I told him I knew better.

Q. Then you knew enough about what was going to be attempted to know beforehand that you would be "bounced" as holding under the receiver?

A. Yes, sir.

Q. Whom did Mr. Crawford tell you he was acting for at that time?

A. He told me he was acting for Mr. Ayer as president of Brown, Bonnell & Co.

Q. Where was Mr. Ayer at that time?

A. That I do not know. I think Mr. Ayer was in New York then.

Q. Was that before or after he went to Europe?

A. That was before he went to Europe.

295 Q. How soon after that did he go to Europe?

A. I do not remember that. I do not know just when he did go.

Q. Did you see him along about that time?

A. No, sir; I never have seen him from that day to this, nor had not seen him then for several months.

Q. How long have you resided in Chicago?

A. I have resided in Chicago since the 1st day of last March.

Q. Do you know where Mr. Ayer is now?

A. Only by report.

Q. Where is he by report?

A. I have understood that he was now residing in the city of London, England. I think I saw it in the paper the other day—the Chicago Tribune.

Q. What inducement did Mr. Crawford hold out to you to go into this?

A. He did not hold out any inducement particularly. I could not see that there was any very great inducement, so far as I was concerned, except that I hoped some day to get the matter settled and get out a portion of what money I had sunk in it.

Q. Then I understand you that you knew you would be "bounced?"

A. Humanly speaking.

Q. And that you were not going to gain anything by it?

A. I did not say that. I expected in the end to gain something by it.

Q. What did you expect to gain in the end?

A. I expected to get in the end a settlement of this business and get, as I say, something out of my stock—to prevent the property from being sacrificed, which, to my mind, it was very plain at that time would be done.

296 Q. How much stock did you have?

A. $20,000.

Q. What was the plan by which you were to get anything out of

the stock by having those judgments levied on the property and selling it out under the judgments?

A. I did not propose to sell it out under the judgments.

Q. How did you expect that those entries of the judgments would affect your plan?

A. I expected this: I expected, just as much as could be, that the receiver would be ousted. That is what I looked for—to see the receiver ousted. If the receiver was ousted, then the jurisdiction of the State court took hold, the judgments became liens on the property, and I would be put in there—was put in there—as receiver of that property, which would have been a very nice thing for me, in the first place; and then, in the next place, I hoped to be able to manage it so as to get the thing out of debt and get the property all cleared off and get the money out of it. That is what I hoped to be able to do.

Q. You expected you would be appointed receiver under the judgments?

A. I expected to be; yes. "The best-laid schemes o' mice and men gang aft a-gley."

Redirect examination:

Q. Speaking about confessions of judgments, what is this whole proceeding in this court based on?

A. On the confession of a judgment.

Q. By whom?

297 A. By me.

Q. The foothold that these gentlemen, then, have got in this court and the jurisdiction that this court has all rests, does it, upon a confession of judgment which you made in this court?

A. Yes, sir.

Q. Who authorized you to do that?

Objected to; objection sustained.

Q. When you confessed the judgment to the Negaunee Concentrating Co. here had you any previous conversation with any officer or agent of the company on that subject, or did you do it by your general authority as vice-president and general manager of the corporation?

Objected to; question withdrawn.

Q. Did you ever confess any judgments in behalf of Brown, Bonnell & Co. except those confessed in the State court? If so, state when, where, and under what circumstances.

Objected to; objection overruled.

A. I did. I confessed a judgment in the United States circuit court at Cleveland in favor of the Negaunee Concentrating Co. at the time of the appointment of the receiver.

Q. Did you also confess a judgment on the creditors' bill in the supplemental suit outside of the common-law suit?

A. Yes, sir.

Q. State whether or not these judgments in the State court were not all presented to the stockholders' meeting of Brown, Bon-
298 nell & Co. in 1884; and, if so, what action was taken at that meeting in the way of disaffirming or ratifying what was done with regard to those judgments.

A. They were so presented and the meeting authorized or legalized the action that had been taken in that matter.

Q. You speak about being "bounced." You did not take any judgment in your own behalf, did you, for anything?

A. No, sir.

Q. State whether there is not a gentleman by the name of John I. Williams down there.

A. There is.

Q. Is he a creditor of Brown, Bonnell & Co.?

A. He is.

Q. What position did he have under the receiver?

A. He was superintendent of the works.

Q. Was there a judgment confessed in his favor?

A. There was.

Q. Is he still in the employ of the receiver?

A. I believe he is. He was the last I heard.

Q. Do you know a man by the name of Chambers?

Testimony on this subject objected to and taken subject to exceptions.

A. I do.

Q. Was he in the employ of the receiver at the time these judgments were taken?

A. He was.

Q. In what capacity?

A. He was employed in the office, assisting me.

299 Q. Was he fully advised about these judgments, the purpose for which they were taken, and the "plan" and the "conspiracy," and all that?

A. He was.

Q. Did he take a judgment?

A. He did.

Q. By confession?

A. By confession.

Q. Is he "bounced?"

A. No, sir.

Q. Still employed by the receiver?

A. Yes, sir.

Q. So that the result, then, was that two of the employees of the receiver, standing in about as high authority as you, actually took these confessed judgments in their own names and they were kept and you were "bounced?"

A. Yes, sir.

Q. Did you have any interest in any of these judgments?

A. No, sir.

Q. Did you represent to a single creditor that there was to be any

collision between the courts in which those judgments were entered and the Federal court?

A. No, sir; I represented that there would not be.

Q. Did you understand, directly or indirectly, from me, Mr. Ayer, or any other human being, that the purpose of those judgments was to undertake to have writs executed on that property and defythe existing possession of the Federal court?

300 A. No, sir; I understood just the opposite.

Q. Did you not understand distinctly that an effort was going to be made directly before the Federal court to have the receiver discharged, as was done at Toledo afterwards?

A. I did understand that.

Q. In your going around among these different creditors, and one thing and another, did you make any statement to any of them giving them any information that these judgments were to be used for the purpose of undertaking in any surreptitious way to get control of that property from the custody of Fayette Brown, receiver?

A. No, sir.

Q. During the course of the interviews which you had with those creditors do you know whether or not some of them were not lawyers?

A. Two of them were lawyers.

Q. Did you not state to them in those interviews that it was the opinion of counsel that had had some experience in the business that the Federal court really had no jurisdiction in the case as made?

A. Yes, sir.

Q. What did this lawyer, for instance, who was a creditor, to whom you submitted the matter, state on that subject?

Objected to. Answer taken subject to exception.

A. One of the lawyers was Mr. Schoyer, and there was a lawyer over in Pennsylvania. The way Schoyer came into this was
301 through the bank at Pittsburgh, whose attorney and a stockholder in which he was. The matter was left to him by the bank when I laid the proposition before them, and he wanted a little time to consider it, and wrote a letter in regard to it, in which he stated that he did not concur in the opinion in regard to the jurisdiction of the United States court; that he thought that we would be beaten, and that he thought we would all be imprisoned for contempt of court—everybody who took a judgment.

Q. State whether or not those judgments were not taken in pursuance of an effort made in good faith by creditors and those representing them to test the jurisdiction and validity of these proceedings in the Federal court.

A. That was my understanding of the matter.

Q. Did you ever hear it intimated by them, or by me, or by Mr. Jones, or by anybody that represented or had to do with them, that there was any attempt or expectation in the slightest degree in the world to interfere with the actual receivership of that property by this court?

A. I never heard anything of that kind.

Q. Did you ever represent any such thing as that to a single creditor?

A. I never did.

Q. State whether or not those judgments were not all confessed on debts that were honest and *bona fide* and due from Brown, Bonnell & Co. to the respective creditors in whose names the judgments were entered.

A. They were, every one of them.

302 Recross-examination:

Q. You say that those confessions were ratified at the meeting of stockholders in January, 1884?

A. Yes, sir.

Q. Who voted on the Ayer stock there?

A. Mr. Crawford, I believe, by proxy.

Q. That of itself was a majority of the whole stock, was it not?

A. Yes, sir.

Q. The capital stock was how much?

A. A million and a half.

Q. Do you know whether Mr. Crawford has a transfer of the Ayer stock?

A. I do not know.

It is stipulated that the schedule of judgments attached to the deposition of Dan. P. Eells and to the answer of the intervening creditors may be used in place of the records of the judgments subject to the introduction of further testimony, if desired, by either party.

303 LAKE SUPERIOR IRON CO. *vs.* BROWN, BONNELL & CO.

Testimony Taken before A. J. Ricks, Esq., Master, February 21, 1885.

The intervening petitioners were represented by their counsel, A. St. John Newberry, Esq., and the respondents to intervening petitioners were not represented by counsel.

JOSEPH COLWELL, a witness on the part of the intervening petitioners, being duly sworn, testified in rebuttal as follows:

(By Mr. NEWBERRY:)

Q. During the years 1882 and 1883 you were the cashier of the Commercial National Bank, were you not?

A. Yes, sir.

Q. (Paper shown witness.) Please look at that paper and state whether you ever saw it before and what it is.

A. Yes, sir; I saw it before. This is a telegram from H. C. Ayer to Dan. P. Eells, president of the Commercial National Bank.

Q. When did you see that telegram first?

A. On the morning of the 17th of February, 1883.

Q. Under what circumstances?

A. It was handed to me by Mr. Howard P. Eells in the Commercial Bank.

Q. What, if anything, took place between you and Mr. Howard P. Eells at that time?

A. There was nothing that I recollect.

304 Q. What I wanted to get at was whether in pursuance of that telegram he got the mortgage and gave it to you?

A. No, sir; he did not; I do not remember; he may have done that.

Q. What did you do after the telegram was handed to you?

A. I obtained the mortgage from the safe in our bank, where it was, and I took the first train to Youngstown and had it placed upon record there on that day—the 17th day of February, 1883.

Q. Do you remember the time that you took the train—what train you took?

A. It was between eleven and twelve o'clock in the morning that it left here.

Q. It appears here that the mortgage was recorded at half past two o'clock on the afternoon of the 17th of February. Did you give the mortgage to the recorder at Youngstown to be recorded?

A. I did. I went direct from the train on its arrival at Youngstown to the office of the recorder of Mahoning county and handed in the mortgage for record.

Q. And that was about half past two o'clock on Saturday afternoon, the 17th of February?

A. It was early in the afternoon. I do not know the precise time. The mortgage itself will show.

Q. Did you call on Mr. Matthews after that?

A. I did. After I had taken dinner at Youngstown I went around and met him at the office of Brown, Bonnell & Co.

Q. Mr. Matthews testifies that at this interview "Mr. Colwell said that he had come down to record that mortgage;

305 that he had left it at the recorder's office, and came over to see me in regard to the matter; that they had got a telegram from Mr. Ayer that morning to record the mortgage, and that he had immediately come down to do so."

Q. Is the telegram to which you have referred the telegram of which Mr. Matthews speaks?

A. I presume it is. I know there was only one.

Telegram referred to offered in evidence by counsel for intervening petitioners, and the same is hereto attached, marked "Intervening Petitioners' Exhibit A."

Q. Mr. Matthews further testifies that you told him at that interview that you "had also learned that John V. Ayer's Sons had gone to protest in Chicago that day." Did you make any such statement to Mr. Mathews?

A. I did not.

Q. Had you at that time when you had this conversation with

Mr. Matthews known that John V. Ayer's Sons had gone to protest in Chicago that day?

A. I had not; and as a matter of fact I do not think that they had until some hours after.

Q. Did you tell Mr. Matthews at that interview that you had had information that John V. Ayer's Sons had failed before you left Cleveland?

A. I did not. I had no such information.

Q. Did you state that you had such information before the mortgage was recorded?

A. I did not.

Q. At what time during the day did this paper go to protest?

A. Not until after the close of banking hours or after three o'clock p. m. universally.

306 Q. So that if the paper of John V. Ayer's Sons went to protest in Chicago on the 17th of February it could not have gone to protest until after three o'clock p. m.?

A. It could not.

Q. From a half hour to an hour after the mortgage had been recorded?

A. It could not.

Q. Then, when Mr. Matthews states that you told him at half past two o'clock on the 17th of February that John V. Ayer's Sons had gone to protest in Chicago that day he states an impossibility, does he not?

A. He does.

Counsel for intervening petitioners at this point offered in evidence the files of the Cleveland Herald, a daily newspaper published in the city of Cleveland, issued on the 17th, 18th, and 19th days of February, 1883, for the purpose of showing that the Herald of the 17th of February contains no mention of the failure of John V. Ayer's Sons, and that the first article on that subject is contained in the Herald issue on Sunday morning, February 18th, 1883. It states: "Chicago, February 17. It was announced after business hours to-day that the great iron firm of John V. Ayer's Sons had failed. It is learned that $15,000 fell due here to-day." The Herald of the 19th is offered for the purpose of showing the time when John V. Ayer's Sons failed, and also for the purpose of showing that they did not fail until after this interview that Mr. Matthews testifies in relation to.

Q. Were you present at a meeting of the board of directors of the Commercial National Bank in the early part of 1883, at which Mr. Matthews appeared before the board?

307 A. I was.

Q. Can you give the date of that meeting?

A. It was February 13th, 1883.

Q. Was there any other meeting early in 1883 at which Mr. Matthew appeared before the board?

A. I do not remember any other meeting at any other time when

he was present. It is not customary for the customers of the bank or any one to meet with the board.

Q. You are regularly present at the meeting of the board of directors, are you?

A. I am always, if I am in the city.

Q. What was done at that meeting?

A. Mr. Matthews came to me on the morning before the meeting—the morning of February 13th—and offered for discount sundry notes of John V. Ayer's Sons, Chicago, endorsed by Brown, Bonnell & Co., aggregating twenty-seven thousand and odd dollars, and I declined to make the discount, for the reason that the bank had already all the paper of that kind which it wished. He urged it, and I declined, and he finally went away. When the board convened at noon, at half past twelve, as usual, there were present Mr. Amasa Stone, Mr. W. J. Boardman, Mr. Fayette Brown, and Mr. E. I. Baldwin. The business which we had to transact was finished, and I prepared to leave the room, when Mr. Stone inquired if there was not some other business, and I told him not; and then he asked me if Mr. Matthews had not offered some paper. I told him Mr. Matthews had and I had declined it, and Mr. Stone suggested that we give Mr. Matthews a hearing. Mr. Matthews having come, in the meantime, into the outside office was invited in and came
308 in. Mr. Matthews urged again the discount of the paper; and, after some conversation, it was finally agreed between the board and Mr. Matthews that we should discount this paper, on the understanding that no part of the proceeds of it should be used, except as other paper which was maturing within the next ten days of the same character—should be retired by payment—so that, in fact, we should not be increasing the line of discount held for Brown, Bonnell & Co. I then urged upon Mr. Matthews the propriety of the recording of this mortgage, which we held, in common with others, as collateral security for moneys loaned to Brown, Bonnell & Co. He stated that Mr. Ayer was opposed to it, and gave as a reason the use of the mortgage was a mere temporary expedient; that they expected very soon to pay all indebtedness secured by it, and the bonds and mortgage would then be cancelled, and that he thought if it were recorded at that time that it would injure the credit of the company; but I still urged—thought it was a matter of the utmost propriety—and Mr. Stone also urged upon Mr. Matthews the same thing. Finally he agreed to write to Mr. Ayer and inform him of our urgent demand that it should be recorded, and with that the meeting broke up.

Q. At that interview did Mr. Stone state before the board that, in view of the case as it stood, the board "would not insist upon the mortgage being recorded; that they would allow it to stand just as it had been; that they would discount the paper for me at that time, but that I was to agree with them that if anything should turn up which would indicate that things were going wrong, that it would make it necessary for that mortgage to be recorded in order to protect their interests; that they should — immediately
309 notified in time, so that they could put the mortgage on record?"

A. There was no such conversation or agreement.

Q. Have you told the whole of what was done at that interview?

A. So far as I can recollect, that was everything that was done.

Q. This was on the 13th of February?

A. On the 13th of February, 1883.

Q. And that telegram which you have introduced was dated on the 16th?

A. Yes, sir.

Q. So that you had good reason to think when you did receive that telegram that it was the consent of Mr. Ayer that the mortgage should be recorded in compliance with your request?

A. We had good reason.

Q. Did Mr. Matthews say that he would write to Mr. Ayer and inform him of your desire to have that mortgage recorded?

A. He did. That was the agreement at the board of directors' meeting on the 13th of February.

Q. So far as you know, was there ever any agreement or consent on the part of the Commercial National Bank with Brown, Bonnell & Co., or with Matthews, that that mortgage should be held off record?

A. Never any. On the contrary, I had repeatedly urged that it be recorded.

Q. Was Mr. Otis present at the meeting to which you referred—the meeting of the board of directors on the 13th?

A. He was not; there were only the four gentlemen that I have mentioned.

Q. Have you any other means of knowing positively except your recollection as to whether or not you knew of the failure of John V. Ayer's Sons on Saturday the 17th of February?

310 A. I have.

Q. Please state what it is.

A. The first failure of John V. Ayer's Sons to pay their notes, obligations, maturing on the 17th day of February, at or after three o'clock p. m. The first notice that I received was on Monday, the 19th of February.

Q. You are speaking now of notice of protest?

A. The first notice of protest. On the morning of the 17th I went to Youngstown, and was gone until late that night. Furthermore, the bank paid to Brown, Bonnell & Co. some $4,000 on the 17th day of February, which it would not have paid, and which it was under no obligations to pay, if it had known that John V. Ayer's Sons' paper would not be paid on that day.

Q. At what time during the day was this $4,000 paid to Brown Bonnell & Co.?

A. It was paid during the business hours of the day, between ten and three o'clock.

HOWARD P. EELLS, a witness on the part of the intervening petitioners, being duly sworn, testified in rebuttal as follows:

(By Mr. NEWBERRY:)

Q. You are the son of Mr. Dan. P. Eells?
A. Yes, sir.
Q. And attend to the details of his business?
A. Yes, sir; in his absence.
Q. Was Mr. Eells in the city on the 17th of February, 1883?
A. He was not.
311 Q. Where was he? Do you know?
A. He was in Arizona, I suppose. Either on his way there or on his return.
Q. (Intervening Petitioners' Exhibit A shown witness.) Did you receive on or about that day this telegram?
A. I did.
Q. It came addressed to Mr. Dan. P. Eells?
A. Yes, sir.
Q. And you opened it?
A. I did.
Q. Please state what you did on receipt of that telegram.
A. I immediatedly consulted with Mr. Colwell as to whether he or I should go to Youngstown and have that mortgage put on record immediatedly, and it was determined that Mr. Colwell should go and he did go immediately. The train left about eleven o'clock.
Q. Where was that mortgage at the time you received that telegram?
A. It was in the vault of the bank among other papers belonging to Mr. Dan. P. Eells.
Q. Did you get it from the vault of the bank and give it to Mr. Colwell?
A. I did.
Q. Did you receive any other message or letter or telegram from Mr. Herbert C. Ayer about that time?
A. I do not remember that I received any other communication from him whatever.
Q. Did you at that time have any information or knowledge that Bonnell & Co. or John V. Ayer's Sons had failed or were in
312 a failing condition?
A. None whatever.

Col. W. H. HARRIS, a witness on the part of the intervening petitioners, being duly sworn, testified in rebuttal as follows:

(By Mr. NEWBERRY:)

Q. In 1882 and 1883 you were a director of Brown, Bonnell & Co., were you not?
A. Yes, sir.
Q. You are one of the intervening petitioners claiming to have the debts of Brown, Bonnell & Co. secured by this mortgage and bonds?

A. Yes, sir.

Q. Were you present at a meeting of Brown, Bonnell & Co. held in Youngstown in January, 1882?

A. No, sir.

Q. Were you present at a meeting held there in April, 1882—a meeting of the directors?

A. Possibly; I do not recollect.

Q. Were you present at a meeting with Mr. Ayer, Mr. Matthews, Mr. Williams, Mr. Eells, and Mr. Stone at Mr. Stone's house in June, 1882?

A. I think I was.

Q. At which these endorsements were determined upon and the bonds agreed to be taken in pledge?

A. Yes, sir; I think so.

Q. At that meeting what, if anything, was said about holding the mortgage off the record?

313 A. I do not remember anything being said about it.

Q. At that meeting did you enter into any agreement or understanding that the mortgage should be held off the record?

A. No, sir.

Q. As far as you know at that meeting did any one else enter into any such agreement or understanding?

A. No, sir; I do not remember any discussion on that subject.

Q. How did it happen, so far as you know, that that mortgage was not recorded?

A. It was not considered that it was necessary to record it. I considered it temporary accommodation for the company pending the strike, and that the endorsements which I and my associates gave were such an accommodation that the paper which was so discounted would be speedily paid, and that the bonds which were given us as security would be retired with the payment of the paper.

Q. What did you consider the financial condition of Brown, Bonnell & Co. at that time?

A. Good.

Q. What did you consider the financial condition of John V. Ayer's Sons, so far as you knew, at that time?

A. I supposed it to be of the very best character.

Q. Did you have any reason to change your opinion or did you, in fact, change your opinion about the financial condition of either of those concerns?

A. Never until I saw the notice of the failure of both concerns in the St. Louis paper.

Q. That was when, do you remember?

A. It was in February, when I was out in St. Louis; about, I should say, February 17th. I do not remember the date.

314 DAN. P. EELLS, a witness on the part of the intervening petitioners, being recalled, testified in rebuttal as follows:

(By Mr. NEWBERRY:)

Q. Were you present at the meeting of the stockholders and directors of Brown, Bonnell & Co. in 1882?

A. I think I was.

Q. What, if anything, was said at that meeting about recording the mortgage before given by Brown, Bonnell & Co. and the issuing of bonds?

A. At some meeting previous to the time of the recording of that mortgage, and I believe it was at that meeting, for I do not remember to have attended any other, the question was raised.

Q. January, 1882?

A. Yes; January, 1882. It must have been at that meeting the statement was made by Mr. Ayer that he was an endorser or had advanced a large amount of money by way of his notes to the company and some cash, and the company was largely indebted to him, and he asked if there could not be some way devised to put the concern into funds, so that it could take care of itself without leaning so heavily upon him, and some one in the board suggested a mortgage—possibly it was Mr. Ayer; I think it was—whether a mortgage could not be negotiated for a half a million of dollars. No authorization of a mortgage was made at that time. The conversation was a free and informal one among the members as to the expediency of issuing such a mortgage. It was generally concurred in as a good thing to do, although I stated that I did not believe it would be possible to place at that time the six per cent. bonds of the company at a rate which would at all be satisfactory to the company, but some one suggested that the times might improve, and

315 that if we prepared a mortgage and got it ready it would be a good thing to do, so that if we had an opportunity to place the bonds satisfactorily, why, we would have them ready on hand to do it. I think that was substantially all that was said. Oh, I think Mr. Matthews raised a point that if such a mortgage were recorded it would be to the prejudice of the company, and I think I suggested in reply that so long as the mortgage remained in the hands of the company and no bonds were sold there would be no necessity for putting it upon record. It would be no mortgage—that is, no operative mortgage—until the bonds were disposed of, and there would be no necessity for giving the company all the disadvantages of the mortgage and none of the advantages of it by putting it upon record when the bonds were not used.

Q. You mean that you suggested that the mortgage did not need to be recorded until some use was made of the bonds?

A. Yes, sir.

Q. Did you then contemplate that the mortgage should not be recorded if the bonds were used to secure endorsements or loans or anything of that character?

A. No, sir.

Q. Was there at that time any expectation that the bonds would be applied to any such purpose?

A. None that I know of. Either at that meeting or at the subsequent meeting in April some one asked whether the bonds could not be used, in case of necessity, as collateral security, nothing being said with reference to the recording of the mortgage, and I said if the necessity should arise I did not see why they could not be used as collateral security.

316 Q. Had that conversation any reference to this endorsement that you aftewards made?

A. No, sir; none whatever.

Q. You have already testified to being present at the meeting at Mr. Stone's house in June, 1882, when these endorsements were agreed upon and the bonds agreed to be given in pledge.

A. Yes, sir; I was there.

Q. At that meeting was any agreement or understanding entered into that the mortgage should be held off the record?

A. Nothing was said in regard to recording the mortgage or holding it off the record whatever.

Q. At the meeting at Mr. Stone's house in September or October, 1882, what, if anything, was said about recording the mortgage or holding it off the record?

A. Nothing was said at either meeting.

Q. When Mr. Matthews testifies that at that meeting in June, 1882, "It seemed to be definitely understood by all parties that the mortgage was not to be placed on record. The talk in regard to it was that as soon as the mill got in operation again we would be able to take this paper up; that it was merely a temporary expedient, and that there would not be any trouble about the mill, when it once got started again, meeting its obligations—paying off this paper and retiring the bonds—taking back the bonds—so that there would be no necessity of having it recorded," is that a fair statement of the conversation that took place?

A. The first part of it is fair. The question was asked by Mr. Matthews if the present endorsers would be willing to renew those endorsements on the paper, and all of us stated definitely that we

317 would not; that we would not endorse the paper unless we were certain that it could be taken up.

Q. Then this statement that it was understood that the mortgage should not be placed on record——

A. (Interrupting.) There was nothing upon which to predicate any such understanding of what was said. I had no such understanding, and I do not think anybody had unless it was Mr. Matthews.

Q. Was this paper which was endorsed shortly after that meeting afterwards renewed?

A. Yes, sir; not all of it. It was renewed in this way: I think that paper was dated in June. What is the date of the second meeting at Mr. Stone's?

Q. In September or October, 1883.

A. At the first meeting Mr. Otis was not present. When the second meeting occurred Mr. Otis was there. He had not endorsed any

paper. The strike had continued so much longer than was anticipated that Mr. Ayer and Mr. Matthews stated that it was absolutely necessary not only to continue the endorsements that had been made, but to increase them by about $50,000, and there had been paid at that time one, I think, of each of the notes amounting to about between seven and eight thousand dollars, if my memory serves me right.

Q. $8,333.

A. About $8,333; perhaps it was. The agreement at that meeting was that if Mr. Otis would endorse $50,000 of the paper we would increase our endorsements to the original point—$50,000 each—so that we, including Mr. Otis, would each be on $50,000 of the endorsed paper. We would each endorse $50,000 and then would contribute from the bonds that we held to Mr. Otis so that it
318 would make the amount that he would hold exactly equal to the amount that we held.

Q. Were those endorsements given?

A. Yes, sir.

Q. Were they renewals of the old paper or were they new paper?

A. They were renewals of the old paper. They were new paper; they were not the same paper; they were new paper given to take up the old paper.

Q. But you still continued to hold the bonds?

A. Yes, sir.

Q. That is, it was regarded as one and the same transaction?

A. Yes, sir. I ought, perhaps, to explain there that when Brown, Bonnell & Co. failed the amount of paper that had been endorsed by Mr. Otis was the entire $50,000, and the amount that we had endorsed, each of us, had been reduced for the reason that our paper had matured, some of it, it having been given before Mr. Otis came in. It had matured before his and was paid before the failure of the company, so that when the company failed we were on $35,000 each or such a matter of paper, and Mr. Otis was on $50,000.

Q. Had all that paper which had matured before the failure of Brown, Bonnell & Co. been paid when it came due?

A. Yes, sir.

Q. That is, renewed paper?

A. Yes, sir.

Q. Do you know where Mr. Otis is now?

A. Yes, sir; he is on his way to Colorado. He went to Chicago last night.

Q. You were not present at the meeting of the board of directors in February, 1883, when Mr. Matthews appeared before the board?

A. That is, the board meeting at the bank?

318½ Q. Yes, sir.

A. No, sir.

Q. You were then in Arizona?

A. I was then in Arizona.

INTERVENING PETITIONER'S EXHIBIT A.

Half-Rate Message.

Mutual Union Telegraph Company. 4.

62 Ch. Jc. hn.; 15; paid; 20 ht.
Dated Chicago, —— 16, 1883.
Received at Cleveland, O., Feb. 17—1.24-2.

To Dan. P. Eells, pres't Commercial Nat. Bank:

I think you had best record mortgage on receipt of this. Will see you Monday.

H. C. AYER.

Done.

319 APRIL 13, 1885—11 a. m.

DAN. P. EELLS, being cross-examined by Mr. CRAWFORD, deposeth as follows:

Q. Do you remember being at the annual meeting of Brown, Bonnell & Co. at Youngstown in January, 1883, the month before the receiver was appointed, and having at such meeting a conversation with Mr. F. H. Matthews with regard to the mortgage of Brown, Bonnell & Co. having become known?

A. I remember that at a meeting of the board of directors or of the stockholders Mr. Matthews spoke of the fact that Mr. McCurdy asked him whether there was a mortgage upon the property, saying that he had heard a mortgage had been placed upon the property. I do not think he held any special conversation with me in regard to it, but I remember his speaking of it in the meeting.

Q. Did he not ask you in that conversation whether you had ever disclosed the existence of the mortgage, and did you not reply to him in substance that you could not understand how Mr. McCurdy had come to learn of the existence of the mortgage, because nobody at your bank except yourself and Mr. Colwell knew of its existence?

A. I do not think I stated it in that way. I think I stated, however, that I did not know how Mr. McCurdy obtained any such information.

Q. Was it not a surprise to you that Mr. McCurdy had obtained such information as to the existence of the mortgage?

A. Yes, sir; I do not know how Mr. McCurdy had gained his information.

320 Q. Did you not express your surprise?

A. I think it likely I did.

Q. Did you not state in substance that, as far as your own bank people were concerned, nobody but yourself and Mr. Colwell knew of that mortgage?

A. I do not think I did say that, because the directors of the bank knew of the existence of the mortgage.

Q. I mean outside of the officers of the bank.

A. I very likely may have told him that I did not think anybody outside of the officers of the bank knew of it. I do not remember it, but I think it is quite likely I told him that.

Q. In your last testimony taken before the master on the 21st of February you were asked this question: "At that meeting was there any agreement or understanding entered into that the mortgage should be held off of the record?" alluding to a meeting at Mr. Stone's house in June, 1882, to which your reply was: "Nothing was said in regard to recording the mortgage or holding it off the record whatever."

A. Yes, sir.

Q. Is your recollection absolutely clear on that subject in the manner in which you have put it?

A. I do not remember that anything was said of that sort. I think I should have remembered it if it had been talked over.

Q. You do not think the question of the record of the mortgage was talked about at all?

A. At that meeting, no, sir.

Q. Nothing was said?

A. No, sir.

Q. In any way?

321 A. No, sir.

Q. No conversation on that subject?

A. No, sir; none that I remember.

Q. Neither by you or any of the other persons within your hearing?

A. No, sir.

Q. There was not anything said about the record of the mortgage?

A. Not so far as I remember.

Q. As to whether it was policy to put it on record or not?

A. I do not remember that the thing was brought up at all.

Q. Was not even discussed or alluded to?

A. No, sir.

Q. Calling your attention, now, to the second meeting at Mr. Stone's house, was there anything said by any of the parties present at that meeting with regard to the question of the record of the mortgage; and, if so, what?

A. I do not now remember that anything was said at either meeting. At the original meetings in Youngstown when the matter of the proposed mortgage was discussed the matter of putting it on record had been suggested, and it was understood that so long as the bonds were not negotiated there was no necessity for putting it on record. Of course, it was supposed that when the bonds were negotiated it would go on record, and I do not remember now that any discussion was held at either meeting at Mr. Stone's house in regard to that subject or that it was spoken of; I do not remember.

Q. You use in the answer the expresson "It was supposed that when the bonds were negotiated it would go on record." Was the

exact word "negotiated" used or what is signified by the word "negotiated?"

A. Well, when they were sold and passed out of the hands of the company I do not know the exact word that was used. The idea was that when the bonds were sold. That was my idea, at any rate. I suppose it was the general idea.

322 & 323

Q. Do you mean by sale or was it the understanding about sale that a hypothecation to the directors as collateral security for endorsement was a sale?

A. I do not think anything was said at any of the meetings about hypothecation of the bonds.

Q. As I understood you to state originally, that was not within the original scope of the intention?

A. No, sir.

Q. With regard to this matter, at any rate?

A. It was expected, of course, that the bonds would be sold—that was what they were made for.

Q. But not to be hypothecated?

A. There was nothing said about their being hypothecated, as far as I remember. I think Mr. Stone at one meeting made this remark: That, in case the necessities of the company should at any time require, these bonds would be good collateral. I think he made some remark at some time, but when it was I do not know.

Q. The trust deed at the foot thereof provides that "the parties of the second part, in token of their acceptance of the trust hereby created, have hereto set their hands and seals on the day first above written," and you have signed your name on the instrument, and Mr. Hay, your co-trustee, has not signed his. Will you please explain why he never signed it?

A. Col. Hay was named as one of the trustees of the mortgage at the request of Mr. Stone, his father-in-law, and I supposed, until you call my attention to the fact now, that his name was on the mortgage. I cannot explain it unless he was absent from home at the time the mortgage was brought to me, and if his name is not there it is by some inadvertence. I feel very sure that his name is signed on all the bonds as trustee.

324

Q. Then he was here at some time, so that he could have signed the mortgage?

A. Yes, sir. Probably when he got home it was forgotten. I cannot account for it in any other way. I supposed until this moment that his name was on the mortgage.

Q. Be good enough to state when your name was put to that instrument.

A. I cannot tell you.

Q. When do you think?

A. It was put as quick as it was presented to me for signature; I think immediately after it was executed.

Q. You are clear on that, are you?

A. Yes, sir.

Q. Did you sign the instrument at the same time you did the bonds?

A. I presume I did, but I cannot tell you from memory about it.

Q. You think, then, that in June, 1882, you probably attested the bonds as trustee and accepted the trust at the same time?

A. At the same time; yes, sir. I have no doubt that is true.

Q. You have no doubt, have you, in your own mind that the two acts were contemporaneous whenever they were done?

A. Substantially contemporaneous, I think; substantially at the same time.

(By Mr. NEWBERRY:)

Q. But you have no recollection, as I take it; simply an impression?

325 A. I only assume that it must be so. I do not remember the date when I signed either of them.

(By Mr. CRAWFORD:)

Q. Your usual course of business would be, though, to attest the bonds and accept the trust at the same time, as one act?

A. Yes, sir; probably.

Q. If, therefore, you accepted this trust in June, 1882, your acceptance of the trust would be recorded at the same time the mortgage was recorded, would it not?

A. I should think it would. It would be a part of the mortgage, would it not?

Q. Now, be good enough to look at this paper, it being a copy of the mortgage, and see —, up to the time of its final record, in February, 1883, you had even then accepted the trust.

A. I had. I have not signed it since the record, if that is what you mean.

Q. If it was signed before the record your name would appear in the record of the instrument, would it not?

A. I do not know whether it would appear in the copy or not. It would depend upon how faithfully it is copied. I have not signed the mortgage since the deed was recorded; I gave you my word for that.

Q. These bonds were to mature at different times, were they not?

A. I think they were; yes, sir.

Q. And blanks were left, were they not, in the bonds?

A. To insert the date when they matured?

Q. Yes.

A. I do not think so. I think they were all filled out before they were brought for signature.

326 Q. Blanks were left in the printing?

A. Yes; filled up in writing, I think. That is my remembrance.

Q. Who filled them up? Do you know?

A. I think Mr. Matthews. They were filled up before they were brought to me.

Q. I understand you to testify now absolutely, as a matter of memory, that your name was on this instrument when it was handed to

the recorder of Mahoning county on the 17th day of February, 1883, for record?

A. If it is on now it was on then.

Q. When you went to Arizona did you leave instructions with any one in regard to what to do with this mortgage?

A. No, sir; I did not.

Q. Absolutely no instructions?

A. No, sir.

327 JOSEPH COLWELL, being cross-examined by Mr. CRAWFORD, deposeth as follows:

Q. In what official relation were you connected with the Commercial National Bank in the years 1882 and 1883?

A. I was cashier of the bank.

Q. Who was president?

A. Mr. Eells.

Q. During Mr. Eells' absence who had the main direction of the bank in its affairs?

A. I had.

Q. Was Mr. Howard P. Eells any official of the bank?

A. No, sir; had no connection with the bank except as a stockholder.

Q. Did the bank have a vice-president?

A. Yes, Mr. Amasa Stone.

Q. Did he give it any special attention? Was he very constantly at the bank?

A. No; he only attended as the other directors did, at the directors' meetings and executive-committee meetings.

Q. But you were the executive head of the bank during Mr. Eells' absence, were you?

A. I was.

Q. At what time did you first see that dispatch marked "Exhibit A," attached to your deposition, purporting to be a dispatch from Mr. Ayer to Mr. Eells?

A. I presume the morning after its date.

Q. At what hour?

A. Between ten and eleven o'clock.

328 Q. I understand you to state in your deposition in substance that you presumed that that was simply an ordinary dispatch from Mr. Ayer, acceding to your insistance that this mortgage should go upon record; is that it?

A. That was my supposition; yes, sir; that it might be that.

Q. You did not conceive for a minute that it indicated any urgency in his affairs or anybody else's, did you?

A. I had no reason to suppose so.

Q. Did you?

A. No; I did not.

Q. It was a matter that required no haste and no urgency?

A. Only as indicated in the dispatch.

Q. Well, how?

A. The recording of the mortgage is generally done at once on its receipt or issue.

Q. It had not been done in this case, had it?

A. It had not; no, sir.

Q. It had been postponed for six or seven or eight months, had it not?

A. Yes, sir.

Q. But I understand you to say that you considered that that was just an ordinary dispatch for the record of the mortgage in the ordinary way, did you?

A. Not in the ordinary way, because the mortgage had not been recorded promptly, contrary to my desire. As soon as it was acceded to I put it on record forthwith, as I would any other mortgage.

Q. How long have you been a bank cashier?

A. Since about 1870.

Q. During that time you have had a good deal to do with
329 mortgages and conveyances, have you not?

A. More or less; yes, sir.

Q. Do you recollect that you ever in those fifteen years of your experience left the bank to personally attend to the record of a mortgage?

A. A good many times.

Q. Name one instance.

A. The last instance was about ten days ago, or two weeks, when I took a mortgage to the recorder's office over here in our county building as soon as we received it.

Q. In banking hours?

A. Yes, sir.

Q. Did you ever go out of the city to record a mortgage before in all your business experience?

A. I do not remember that I ever had a mortgage to record out of the city before or since.

Q. This was on Saturday, was it not?

A. Yes, sir.

Q. A busy day with banks, too, is it not?

A. No, not unusually; rather to the contrary.

Q. Your president was absent, too, was he not?

A. Yes, sir.

Q. That threw the whole direction of the bank's affairs on your shoulders, did it not, for the time?

A. Not necessarily; there was an assistant cashier who could attend to matters in my absence, and did usually.

Q. State what there was of urgency, in your mind, that should cause you, the cashier of a bank, on Saturday, a busy day——

A. I beg pardon. I just testified that it was not an unusually busy day.

330 Q. A busy day, I said. I did not say an unusually busy day.

A. Yes.

Q. That should cause you to personally take this mortgage down to Youngstown in your own hand to record it on that day?

A. The principal reason was that I had been for a long time very urgent that the mortgage should be recorded, and just as soon as all opposition to it on the part of Mr. Ayer was removed I saw to it that it was on the record forthwith.

Q. You could just as well have sent it down by a bank messenger, could you not?

A. I could.

Q. That would have been the ordinary way, would it not, if there was no urgency?

A. No, sir.

Q. The ordinary — was for you and nobody else to take it, was it?

A. A matter of importance. Yes.

Q. Why was it a matter of importance to record it on that day?

A. It covered a large indebtedness to the bank.

Q. It had covered it for six months, too, had it not?

A. Yes, sir.

Q. And had not been recorded for six months?

A. No, sir.

Q. When you got to Youngstown you did not even go to the hotel to get your dinner first, did you?

A. No, sir.

Q. You went directly from the train to the recorder's office before you dined?

A. The recorder's office is within a few rods of the station and much nearer than the hotel.

331 Q. You arrived there about half past two o'clock, did you?

A. I do not remember. Whenever the train time is.

Q. And you went straight from the station to the recorder's office?

A. Just about a stone's throw. Yes, sir.

Q. And yet you testify that you had not the remotest idea that there was any special urgency with regard to the record of this mortgage at all?

A. I had no knowledge of any. I did not know what might be. I did not surmise anything.

Q. It was an ordinary transaction that you did not conceive had anything about it other than the usual record of a mortgage in the ordinary way?

A. No; nothing more than an important transaction which I had been anxious should be put in proper shape on record; nothing else.

Q. You could just as well have sent it down by a messenger, could you not?

A. I could have done so; yes, sir.

Q. Or sent it by express?

A. I could have done so; yes, sir.

Q. Ordinarily you would have done that, would you not, rather than leave your post as cashier in the absence of your chief?

A. Well, you are going on false suppositions.

Q. Please answer my questions. I will look after the suppositions.

A. Well, you put the question wrong.

Q. I will put the questions and you put the answers.

A. I am answering. Mr. Eells was not the executive officer of the bank; I was, ordinarily, and in my absence the assistant
332 cashier. Mr. Eells was nominally the president. He took no active part in the business at all.

Q. Mr. Colwell, then, was really the executive head of the bank?

A. Yes, sir; and in my absence the assistant cashier was practically, though nominally Mr. Eells was the president and the head of the bank.

Q. You are not able now to recall a single instance where you ever went out of town to attend to a matter in the ordinary course of business that might have been equally as well attended to by a messenger or clerk from the bank or done by express, are you?

A. I had often gone out of town to attend to the business of the bank. It is a matter of opinion whether it could have been done as well by somebody else. I naturally thought that an important matter that ought to be done could be quite as well done by myself as anybody else and had better be done by myself than anybody else.

Q. You intended to see that that mortgage went upon record that day, did you not?

A. I did; yes, sir. I should have seen to it earlier if I had not had any opposition from Mr. Ayer.

Q. Be good enough to state when and where you had opposition from Mr. Ayer to the putting of this mortgage upon record.

A. Repeatedly.

Q. When?

A. Once when Mr. Ayer himself was in Cleveland, and on several occasions——

Q. Give the date of that.

A. I cannot give the date. I cannot remember.

Q. About the date?

333 A. It was prior to this transaction.

Q. How long prior?

A. Within the year. I rarely saw Mr. Ayer—never saw him, I think, but two or three times.

Q. State what was said.

A. I cannot state the language. The substance of it was that I thought that that mortgage should be recorded. Mr. Ayer objected to it on the ground that it was inexpedient; that the bonds were used as collateral for a mere temporary matter which would soon be adjusted and the bonds returned to the company, and that he thought it was unnecessary and unwise that it should be put on record.

Q. Did you defer to that?

A. At that time I did.

Q. You knew well enough that the mortgage was right in the vaults of your own bank, where you could have recorded it without Mr. Ayer's permission, did you not?

A. No, sir; not then I did not.

Q. When did you know the mortgage was there?

A. When Mr. Eells went away.

Q. How did you know that the mortgage was not recorded when you had this conversation with Mr. Ayer?

A. Because I had understood, I do not know from whom, but from some of the parties.

Q. Give us your opinion as to whom you understood it from?

A. From some one of the directors of Brown, Bonnell & Co.

Q. You understood from some of the directors of Brown, Bonnell & Co. that the mortgage was not of record, did you?

A. I did; yes, sir.

334 Q. At the very time that your bank had loaned money on the bonds, too?

A. Yes, sir.

Q. Were they also directors of your bank that told you that?

A. That I cannot remember.

Q. It was not Mr. Ayer that told you that, was it?

A. I do not remember about that.

Q. What is your recollection?

A. I do not remember who it was.

Q. Your first talk with Mr. Ayer about it was asking him to allow the mortgage to be recorded, was it not?

A. I do not know that that was the first talk, but when I did first talk with him, I presume it was, I told him that—that I thought it ought to be on record.

Q. You knew at that time from some one that it was not on record?

A. Yes, sir.

Q. Why did you ask Mr. Ayer to allow it to go on record?

A. Because I understood Mr. Ayer to be the principal party objecting to it.

Q. Whom did you understand this from? Let us have your recollection on that matter.

A. I do not know.

Q. Your memory is a blank on that subject, is it?

A. Yes, sir.

Q. Was it Mr. Eells that told you that?

A. I do not remember who it was.

Q. Will you swear that it was not Mr. Eells?

A. No, sir; I will not.

335 Q. What is your best recollection as to who it was?

A. I have repeatedly said that I had no distinct recollection as to who it was.

Q. It seems to have been such an important matter in your mind that you were asking Mr. Ayer on several occasions, as you express it, insisting that this mortgage should go upon record?

A. I did to him personally once and to Mr. Matthews, representing him, repeatedly.

Q. And yet your memory is a perfect blank as to how you happened to know that this mortgage was not recorded?

A. Yes, sir; that is a blank. I confess I do not remember from whom I heard it.

Q. And you swear now that you did not even know that the mortgage was lying in Mr. Eells' safe, right in your own bank, until he went away to Arizona?

A. I do not think that I did.

Q. How long was that before it was recorded?

A. Oh, a month or two, I should think.

Q. You knew Mr. Eells was the trustee?

A. I knew he was one trustee. I think I did. I will not be positive.

Q. It is shown on the bonds that you held, is it not?

A. Yes; that is a fact. Yes; I must have known it.

Q. And Mr. Hay?

A. Yes, sir.

Q. Didn't you go to Mr. Eells, the trustee, and ask him why he did not record this mortgage?

A. I do not remember that I did; no, sir.

336 Q. Right in the bank every day?

A. No, not every day.

Q. Substantially?

A. Often enough; yes.

Q. You knew he was trustee?

A. I did.

Q. You assumed, did you not, as a matter of business, that he had the mortgage in his hands?

A. I do not know that I could assume that he or Mr. Hay had it.

Q. One or the other of them?

A. One or the other of them; yes, sir.

Q. And yet you never went to either of the trustees and asked him to record this mortgage?

A. I won't say that I did, but I think it very likely I may have said the same thing to Mr. Eells that I did to Mr. Ayer.

Q. Give us your best recollection?

A. My best recollection is that my opinion on the subject was made known to all of them.

Q. What did Mr. Eells say in respect to that?

A. I do not remember as to that, but I presume it was a repetition of Mr. Ayer's objection.

Q. Have you any memory that you ever said a word on the subject to Mr. Eells?

A. My impression is that I did; decidedly.

Q. Is that a decided impression?

A. Quite; yes, sir.

Q. In what way did you ask him? Did you ask him, telling him that you insisted upon the mortgage going upon record, or that you urged that it go upon record?

337 A. No, sir; I do not think I did it so strong as that. I think I told him that I thought it ought to go on record.

Q. And what was his reply?

A. My recollection is that the general reply of all the gentlemen

to whom I talked on the subject was substantially the same as Mr. Ayer's, that it was a temporary matter that would soon be closed up and the bonds withdrawn, and that it would not be necessary that it should be put upon record, and that it might, perhaps, inure to the disadvantage of Brown, Bonnell & Co.

Q. If it was put upon record?

A. Yes.

Q. You think that it was repeated to you by Mr. Eells or the substance of that?

A. Yes; I think that was the general feeling of the directors of Brown, Bonnell & Co.

Q. Whom do you mean? Do you mean Mr. Otis?

A. I mean Mr. Otis, Mr. Eells, and Mr. Stone.

Q. As well as Mr. Ayer?

A. And Mr. Ayer.

Q. And you knew at the time that these very people who were expressing this view to you held those very bonds as collateral security for the indorsements which they were making, did you not?

A. I knew some of them did; yes, sir.

Q. When Mr. Ells left for the West did he leave any instructions with you in regard to that mortgage?

A. I think he told me that the mortgage was among his papers, which his son had access to, and could be used at any time—access could be had to it at any time.

338 Q. But he left no instructions with you with regard to recording it or not recording it or anything?

A. No, sir.

Q. He just simply told you that the mortgage was there?

A. Yes; I presume he told me. It was made known to me, and, I think, direct from him; yes, sir.

Q. How many times did you see Mr. Matthews prior to this meeting in the bank in February, about a week or such matter before the receiver was appointed?

A. I could not tell how many times, but several times. He usually came to the bank with paper that he wished us to discount for Brown, Bonnell & Co. I saw him at those times.

Q. I am asking for the purpose of locating those conversations. I think you have stated that you probably only had one conversation with Mr. Ayer about the non-record?

A. I recollect but one. I rarely saw Mr. Ayer. He was rarely here or if he was I did not see him.

Q. The business was largely transacted by Mr. Matthews?

A. Yes; mainly. I think when we made loans to them they were always offered by Mr. Matthews.

Q. So you recollect only one conversation with any distinctness with Mr. Ayer?

A. Yes, sir.

Q. I mean of the fact of there being one.

A. That is my only recollection.

Q. How long was — after you saw Mr. Ayer that you first saw Mr. Matthews on this same subject?

A. I cannot remember that.

Q. Some months or a short time?

339 A. Probably not very long after, but I cannot tell when.

Q. Please give, as nearly as you can, the conversation that took place between you and him with regard to the non-record of this mortgage.

A. I cannot relate those conversations, except that the general tone was that at every opportunity I urged that the mortgage should be put on record. I cannot give dates.

Q. How was Mr. Matthews to put it upon record? He did not have it, did he, or have any control of it?

A. No, but Mr. Matthews especially represented Mr. Ayer.

Q. Mr. Ayer was the mortgagor?

A. Yes; he was the mortgagor. He was the president of the company.

Q. Do you ever remember to have asked a mortgagor before as to whether you should put a mortgage that was executed in your favor upon record or not?

A. I do not remember that I ever had a mortgage but in one instance before under those circumstances.

Q. You mean where it was held off of record?

A. Yes, sir; so that my recollection would be a blank on that subject.

Q. What did Mr. Matthews say in response to your urging him that the mortgage should go upon record?

A. He simply reiterated in substance what Mr. Ayer had offered.

Q. In your mind, therefore, judging from the way you went at Mr. Ayer and Mr. Matthews about allowing the mortgage to go upon record—and you did not make any special urging to the trustee who had the mortgage——

A. Except Mr. Eells.

340 Q. You only recall one conversation with him, and you said, I believe, that in that you did not urge?

A. I did urge; I did not insist, my testimony was.

Q. You had a pretty fixed opinion in your mind that it was a question of the consent or the non-consent of Mr. Ayer that was going to put the mortgage upon record or not put it there, did you not?

A. Yes, sir; I think that the whole reason why it was not put upon record was that the other directors deferred to Mr. Ayer's opinion or desire.

Q. And that the mortgage was to go upon record or not go upon record as Mr. Ayer, the president of the corporation, determined? What was it?

A. I think that Mr. Ayer's objection was the only obstacle in the way; yes, sir.

A. And up to that time his objection, coincided in by the other directors, had kept it off of the record?

A. Yes, sir.

Q. You saw Mr. Matthews, did you not, in Youngstown on the day this mortgage was recorded?

A. Yes, sir.

Q. You had some conversation with him with regard to the business that took you down there?

A. Yes, sir.

Q. You have stated, I believe, in substance, in your testimony that you had no knowledge whatever, at the time you were in Youngstown, that either John V. Ayer's Sons or Brown, Bonnell & Co. were in the slightest difficulty?

A. No knowledge whatever; no intimation from any source.

Q. What bank is your correspondent bank in Chicago?

341 A. The Commercial National.

Q. You had received no telegram from it or from anybody else in Chicago before you left here that John V. Ayer's Sons' paper was going to protest that day?

A. No, sir.

Q. No intimation of it?

A. No intimation from any source; no idea.

Q. You know Mr. Otis, one of your directors, was in Chicago, do you not, that day?

A. I do not remember that he was. I believe he was not present in the bank that day. I learned that from the record in looking it up some time ago. Where he was I do not know.

Q. You received no telegraphic communication from your correspondent bank on the morning of the 17th of February?

A. None at all, or from any other source. The 17th was Saturday. That was the day I went to Youngstown. I had had no telegram and no intimation of any kind. As a matter of fact, there was no paper protested or unpaid at that time.

Q. How do you know that?

A. That we had or knew anything about.

Q. What you mean is that they did not go to protest until three o'clock on that day?

A. I think that is the fact.

Q. That is the fact as far as your paper is concerned?

A. As far as my knowledge is concerned.

Q. Do you not know, as a matter of fact, that their check was thrown out of the clearing-house between ten and eleven o'clock in the morning, and that the noon papers in Chicago had their failure all in?

342 A. On the 17th?

Q. Yes.

A. No, sir; I never heard of it.

Q. And do you not know that one of your directors was in their bank there and knew all about the failure long before this mortgage was recorded?

A. No, sir; never heard of it until this moment. I doubt the fact, if you will permit me.

Q. Which fact—that one of your directors was in there?

A. Yes, sir.

Q. You had no talk with Mr. Matthews of any kind, character, or description about any prospective failure of John V. Ayer's Sons on that day, had you?

A. I asked Mr. Matthews if anything special had occurred—if there was any trouble of any kind. He answered that he knew of none.

Q. What led you to ask that question; did you anticipate any trouble?

A. I did not.

Q. You had not the slightest idea of any?

A. I had not. I had every confidence that John V. Ayer's Sons were very solid and firm.

Q. That was the first thing that you asked him?

A. No; I do not know that it was the first thing that I asked him. I did ask him that while I was there. I cannot remember exactly what I said.

Q. Did you tell him then that you had got a dispatch from Mr. Ayer?

A. I did, and that I had recorded the mortgage.

343 Q. Mr. Howard Eells telegraphed down to Mr. Mathews, did he not, that you were coming that day?

A. Not to my knowledge.

Q. Do you not know that Mr. Howard Eells telegraphed down there to Mr. Matthews that day that you were coming down to record that mortgage and to assist you all he could?

A. Not to my knowledge.

Q. You do not even know it now?

A. If you say it is so I will not deny that it is so.

Q. I have not said that it is so. I am asking you if you know it is so.

A. I do not know it is so; no, sir. I did not need any assistance from Mr. Matthews to record that mortgage.

Q. Mr. Matthews has testified that, in substance, you stated that you had learned that John V. Ayer's Sons had gone to protest in Chicago that day, and you said you were sorry for it, and thought that perhaps some arrangement might have been made, if it had been got at in time, to have fixed the matter up in such a way that it would not have been necessary.

A. Do you mean to say that that is his testimony?

Q. Yes; I am reading from it. Do you mean to say that no conversation of that kind occurred between you that day?

A. No, sir.

Q. That that is a simple, pure invention?

A. Well, yes; it is imaginary. I won't say that Mr. Matthews meant to testify wrong in there, but no such conversation occurred at all or could have occurred.

Q. You did not imagine that there was the slightest exigency about the matter, although you were down in person to record the mortgage, and although the question that you asked Mr.

344 Matthews—the only thing that you have stated in your evidence thus far—was whether he had heard there was any trouble?

A. Yes, sir.

Q. And yet you testify that there was nothing whatever that occurred of that kind between you and Mr. Matthews?

A. Nothing whatever of that sort occurred.

Q. What did Mr. Matthews say when you asked him whether he had heard anything special or whether there was any trouble?

A. He said he knew of none.

Q. What trouble did you anticipate that was in your mind when you framed that question?

A. It was mere inquiry as to the possibility of anything arising beyond his mere concession to our desire to have it recorded.

Q. Was there something in your mind then that led you to connect this telegram that you had received from Mr. Ayer, asking that the mortgage be recorded, with some trouble?

A. There had some two or three hours, perhaps more, elapsed between the time that that dispatch came to my knowledge and my arrival there and I naturally had been revolving the matter over in my mind a good deal.

Q. With what result?

A. With an entire absence of knowledge of what specially could have brought about a change of heart in Mr. Ayer on the sbject of that mortgage, and I wanted to know what causes, if any, there were.

Q. I will ask you now to state what that conversation was with Mr. Matthews, beginning at the beginning and going through.

A. That I cannot do.

345 Q. Give it as nearly as you can.

A. I presume I first——

Q. I do not want any presumptions; I want recollections, if you have them.

A. I have none.

Q. Have you any memory about anything else that occurred except your question to him as to whether he had heard anything special and whether there was any trouble? Do you remember anything else you asked him that day except that?

A. Nothing, except that I asked him to transfer some certificates of stock of the Mahoning Coal Company, which I took with me, from the name—I think they were registered in the name of Brown, Bonnell & Co.—to the name of W. J. Boardman, trustee.

Q. Those were some of the certificates that were included in the mortgage?

A. In the mortgage; that was a part of the transaction; yes, sir.

Q. Who directed that they should be put in the name of William J. Boardman, trustee?

A. I have an impression—it is somewhat vague, but still I have an impression—that that was a suggestion of Mr. Stone's.

Q. When made?

A. Before I left Youngstown.

Q. You had a consultation with Mr. Stone, did you, then, before you went down to Youngstown, about the matter?

A. I think it was Mr. Stone I told that we had had this dispatch.

Q. Reading it, I presume, to Mr. Stone or showing him the dispatch?

A. I do not know whether I showed it to him.

Q. Telling him its purport?

346 A. Yes; and asked him what I should do with the stock; if I should have that put into the name of the trustee. I think that was it.

Q. Who had given you any authority over the matter about transferring the stock at all?

A. Mr. Stone was a director of Brown, Bonnell & Co. That was a suggestion from him.

Q. Where did you get the stock?

A. The stock was with the mortgage, given to me by Mr. Howard Eells.

Q. Mr. Eells gave you no instructions about the stock, did he?

A. No, sir; none. That was why I conferred with Mr. Stone.

Q. What was the necessity of anything of that kind if there was no urgency?

A. It was a part of the same transaction.

Q. It was not part of the same taansaction. That simply required that the mortgage should be recorded.

A. It was all a part of the same transaction. I regarded it so.

Q. Did you go and ask Mr. Hay what you should do?

A. I did not; I did not see Mr. Hay.

Q. He was in the city, was he not?

A. I do not think he was.

Q. You had no instructions from Mr. Eells of any kind in regard to this?

A. Not in regard to the stock; no, sir.

Q. It was not contained in the telegram from Mr. Ayer?

A. It was not.

Q. Do you know whether you had the consultation with Mr. Stone at his house or at the bank with regard to what should be done?

347 A. I do not recollect. In fact, I am not positive that it was Mr. Stone, but I think it was. Whether I saw him at the bank or at his office I do not know.

Q. At any rate, the result reached was that you should take the stock of the Mahoning Coal Company down with you to Youngstown and transfer it out of the name of Brown, Bonnell and Co. into the name of somebody that you and Mr. Stone or somebody picked out. Is that it?

A. That is substantially it; yes, sir.

Q. I understand you to state distinctly that you had no authority to do that from the trustees or either of them?

A. No, sir; no direct instructions.

Q. Or any indirect instructions, had you?

A. No, sir; no instructions. The stock was with the mortgage, and was part of the property conveyed by the mortgage.

Q. Why did you not transfer the stock to the names of Eells and Hay?

A. I say I think it was the suggestion of Mr. Stone that it should be done as it was.

Q. So that was part of your business down to Youngstown that day, too, was it?

A. That was a part of the same transaction.

Q. Why was the exigency for the transfer of the stock at all? It was embraced in this mortgage, and the certificates were actually in the custody of the trustees.

A. Simply as a part of the conveyance, that is all, from Brown, Bonnell and Co.

Q. But they had the certificates, did they not, of the Mahoning Coal Company, and the certificates were duly endorsed, were they not, by Brown, Bonnell & Co.?

348 A. Yes.

Q. And they were actually in the custody of the trustees?

A. They were.

Q. And they had been in the same condition ever since June of the year previous, had they not?

A. I do not know how long.

Q. And you were without any instructions from the trustees or either of them as to anything to be done with them?

A. Yes.

Adjourned until 2 o'clock p. m.

349 APRIL 13, 1885--2 p. m.

WILLIAM J. BOARDMAN, being sworn, deposeth as follows:

(By Mr. CRAWFORD:)

Q. Were you a director of the Commercial National Bank in 1882 and 1883?

A. Yes, sir.

Q. And still are?

A. Yes, sir.

Q. Were you present at any meeting of the board of directors in 1882, when some discounts for Brown, Bonnell and Company's account were up before the board?

A. Yes; I was, I think.

Q. Did you, as a director of the bank, know at that time that the loans or discounts were to be secured by the deposit of these bonds that were issued under the trust deed to Eells and Hay, trustees?

A. I should say this, that I was not present every time when paper was discounted for Brown, Bonnell and Co., but I was present at times, and I recollect about bonds or mortgages or something being given as security for paper that was being discounted for Brown, Bonnell and Co.

Q. Your recollection is general rather than precise about what occurred?

A. Yes, sir; I was interested in any of these concerns.

Q. Let me call your attention more precisely to an interview that took place at the bank in February, 1883. Do you remember being

present there when Mr. Mathews came before the board with reference to additional discounts?

A. I remember being present at one time when Mr. Ma-
350 thews came before the board with reference to obtaining discounts.

Q. Shortly before the failure of Brown, Bonnell and Company?

A. Yes.

Q. Mr. Stone was there, I think.

A. I think so.

Q. And Mr. E. I. Baldwin?

A. He may have been. I do not know.

Q. Do you remember what took place at that time with regard to the additional discounts which Mr. Mathews requested the bank to make for the account of Brown, Bonnell and Co.?

A. Not very definitely, only I remember that he wanted discount, and I think he stopped me or I met him in the passage-way as he was going along, if I recollect right, and he spoke to me about it just as I was going into the meeting of the board.

Q. Do you remember his being called in before the board and making a statement?

A. I cannot tell definitely whether Mr. Matthews was in before I went out or not, but my impression is that he was; still I could not be sure about that.

Q. Do you remember anything being said at that meeting with regard to the non-record of this mortgage?

A. I can remember that the matter came up.

Q. In what way did it come up?

A. That I could not tell.

Q. You knew, did you not, as matter of fact, that this mortgage was not recorded?

A. Whether I ever learned it before that time or not I do not know.

Q. You knew it then, did you not?

A. I learned it then, perhaps. Whether I learned it then
351 for the first time or not I do not know.

Q. Do you remember Mr. Colwell urging the record of the mortgage and stating, in substance, that he had known several instances where a mortgage had been kept off the records in this way, and that it had always resulted in difficulty? Do you bear in memory any such conversation as that?

A. No.

Q. What was said at that meeting with regard to the record of the mortgage?

A. I could not tell you definitely. I can tell you what I said, probably, to Mr. Colwell or to Mr. Matthews—that is, probably it would be more what I would have said than my recollection of what I did say, because I do not remember very distinctly about it. I have an impression that I stated that the bank should not have anything to do with not having that mortgage recorded, or to that effect.

Q. Do you think that the first intimation that you had that it had not been recorded was at that time?

A. I could not say as to that. I may have known it before that. I could not tell. I do not remember.

Q. In other words, if I get the point of your suggestion, it was that the bank should not affirmatively make a contract or an agreement that it should not be recorded?

A. It should not have anything to do with the matter of not having it recorded.

Q. Should stand mute on that subject?

A. Yes, sir.

Q. Do you remember whether or not Mr. Dolwell made any instance at that meeting that it should be recorded?

352 A. My recollection as to what occurred and what was said there is very indefinite. I do not remember his saying anything about not having it recorded. It may have occurred. I do not remember.

Q. Do you remember whether or not Mr. Matthews did not urge at that meeting that the record of the mortgage would very seriously hurt the credit of Brown, Bonnell and Co.?

A. I cannot tell that. I remember hearing it said that Mr. Matthews took that position, but whether he said it at that time or whether somebody else told me I do not know now. I could not tell.

Q. Was there any agreement made at that meeting that the mortgage should be recorded?

A. No; I do not think there was any agreement in any way about it.

Q. Was there anything said about Mr. Colwell at that meeting to the effect that Mr. Matthews should write to Mr. Ayer and get Mr. Ayer's consent to allow it to be recorded?

A. My impression is that I went out before Mr. Matthews left, if he was there.

Q. While you were there did anything of that kind occur?

A. No; not that I recollect of.

Q. You knew, then, at that meeting that the mortgage had not been recorded?

A. I think I did.

Q. And there was nothing in your hearing said or done at that meeting that looked towards an immediate record of the mortgage, was there, by anybody?

A. No; I don't think there was. I do not remember.

353 Q. Were you in Cleveland when the failure of John V. Ayer's Sons and the failure of Brown, Bonnell and Co. occurred?

A. I think I was.

Q. The receiver of Brown, Bonnell and Co. was appointed on Tuesday. Were you in the city at that time or consulted with regard to the matter prior to the appointment?

A. No, sir; I think not. Whether I was in the city that particular day or not I could not state. I probably was.

Q. On the Saturday previous, which was the 17th day of February, do you remember having had any consultation with Mr. Stone and Mr. Colwell or either of them with regard to your being made a trustee to hold any Mahoning Coal Company stock?

A. No; I never had any consultation. I never knew anything about it until after it was done and I was informed of it.

Q. How long after it was done were you informed of the fact?

A. I would not undertake to state. I do not remember.

Q. Was it quite recently after the transaction?

A. I should not think it was many weeks afterwards.

Q. Your first knowledge that the Mahoning Coal Company stock had been transferred to your name as trustee was conveyed to you by whom?

A. I should say by either Mr. Colwell or Mr. Howard Eells, probably.

Q. What did he state in connection with that as to the impelling reason for your being made trustee?

A. The only reason he gave that I recollect was that Mr. Stone desired that I should be named as a trustee. I expressed some regret about it, because I had nothing to do with the matter and did not care to act as trustee.

354 CHARLES A. OTIS, being sworn and examined by Mr. CRAWFORD, deposeth as follows:

Q. You were a director of Brown, Bonnell & Co., were you not, in 1882 and 1883?

A. I was in 1882, and I believe I was in 1883.

Q. Do you remember a conversation which took place among some of the directors of Brown, Bonnell & Co. at the house of Mr. Amasa Stone in September or October, 1882, at which you were present?

A. That is a good while ago. I do not know that I remember particularly about it. What was it in relation to?

Q. It was a conversation with regard to your becoming an endorser of the company's paper to the amount of $50,000.

A. Yes; I think it was then. I will not swear to that. I know there was a conversation in regard to indorsing, which I did.

Q. Was not that conversation at Mr. Stone's house?

A. That I do not remember.

Q. What is your best impression?

A. I cannot say whether it was there or whether it was at the bank.

Q. Who was present?

A. That I do not remember.

Q. Was Mr. Ayer there?

A. It was in the presence of Mr. Ayer.

Q. Was Mr. Matthews there?

A. I do not remember.

Q. Was Mr. Williams there?

A. What Williams?

Q. Manager of the mill and one of the directors.

355 A. No; I guess not. I do not remember of ever having my conversation in the presence of Mr. Williams.

Q. Was Mr. Stone there?

A. It was at his house. He must have been there.

Q. Was Mr. Eells there?

A. That I do not remember.

Q. Up to that time you never had indorsed for Brown, Bonnell & Co., had you? With whom was your talk?

A. Oh, I had a talk with Mr. Ayer and Mr. Eells. Whether it was at the bank or not I do not remember, or whether it was at Mr. Stone's house.

Q. What was said in that talk; what was the request made of you and the agreement?

A. The agreement was that I was to endorse the paper.

Q. For how much?

A. $50,000. I was in Europe in 1882, and when I got back it seems as though there had been some indorsements made by these other parties, and I came in and indorsed my *pro rata*, I think, afterwards. I was very sorry I did not stay over there longer.

Q. What was the understanding or agreement as to what security you should have for these indorsements that you were to make?

A. The security was such an amount of bonds.

Q. What bonds?

A. Brown, Bonnell & Co. bonds.

Q. The same bonds that you have now in hand and claim to be hypothecated?

A. Yes, sir.

Q. Did you know at the time those indorsements were made that this mortgage had not been recorded?

356 A. I did not know anything about it.

Q. Were you then a director in the Commercial National Bank?

A. Yes.

Q. And still are?

A. Yes.

Q. And were in Chicago, were you not, on the day John V. Ayer's Sons failed?

A. I was.

Q. Do you remember of going into the house of that firm about one or two o'clock on the day of the failure with Mr. Higgins?

A. Not as early as that.

Q. How early?

A. Somewhere about half past three or four o'clock. I was there but a few moments; had just time enough to get down to the train to come home.

Q. How did you know of the failure?

A. Did not know of it until then.

Q. How did you know of it then? You went in there with Mr. Higgins, did you not?

A. Yes.

Q. And it was not as early as two o'clock?

A. No.

Q. Did you not go in there and ask as to whether or not your particular claim was not going to be protected? Was not that the object of your visit there?

A. There was no such object at all.

Q. Did you not so state to both Mr. Hawkins and to Mr. Irwin?

357 A. No, sir; I did not.

Q. What was the object?

A. There was no object at all.

Q. You knew of the failure then, did you not?

A. No; I never knew anything about it until I went in there. It was accidental that I went in.

Q. Are you clear in your recollection about this transaction?

A. I know all about it. I did not know anything about it, I tell you, until I went in and met Mr. Ayer at his door. You were in there at the time, were you not?

Q. No.

A. Well, Grannis was there. I did not know anything of it until I stepped my foot into the door and Mr. Ayer told me of it.

Q. Did you go alone then?

A. I won't say. I do not know whether Higgins was with me or not. Perhaps he was; I am not positive about that; it is a long time ago. I had business with Mr. Higgins at his office, and he may have gone with me; but I never knew anything about it or suspected anything about it until I met Mr. Ayer in his private room there coming out of the door.

Q. Do you not know that the twelve-o'clock editions of the papers in Chicago that day had it, and it was cried all along the street?

A. I did not see them, because I was in business in Mr. Higgins' office with him until the time I left his office for home; and it was merely accident that I went into Mr. Ayer's office. I was on my way to the depot.

Q. You say you met Mr. Ayer there?

A. I met Mr. Ayer in his office—the first time I ever knew of it.

358 Q. And you were then advised of the failure?

A. He advised me.

Q. You met Mr. Grannis?

A. Mr. Grannis came in while I was there. I did not have any talk with him at all; never knew him before; was introduced to him then.

Q. Desiring to refresh your recollection on the matter, did you not come in there as early as two o'clock on the 17th day of February, 1883, accompanied by Mr. Higgins, and did you not ask to see Mr. Ayer, who had gone, and did you not make known both to Mr. Hawkins and to Mr. Irwin—you know them both, do you not?

A. Yes.

Q. That you had called for the purpose of seeing whether or not Mr. Ayer was going to protect your claim against the house?

A. No, sir; I did not.
Q. Was there no talk of that kind?
A. No talk of that kind. I never knew anything about the failure until I met Mr. Ayer in his own office. I did not go there for that purpose, for I knew nothing about it.
Q. You say you left that day to come home?
A. I left that day to come home.
Q. And then you went back, did you not?
A. I went back.
Q. And you were in Chicago on Sunday morning again?
A. Yes, sir.
Q. You returned from Laporte, did you not, or Elkhart?
A. Yes, Elkhart, for the reason that I could not get through to Toledo.
Q. What was the matter?
359 A. A freshet. I went back to Chicago.
Q. Did you see Ayer on Sunday?
A. No, sir.
Q. You saw Matthews there, did you not?
A. I saw Matthews and came home with him.
Q. You left there Sunday night, did you not, with Matthews?
A. Left there Sunday night with Matthews.
Q. And came straight here?
A. Came straight here.
Q. Did Matthews go to a hotel?
A. I cannot say whether he went to a hotel or not.
Q. He went to your house, did he not?
A. He went to my house and took breakfast; that was all.
Q. Took dinner, too, did he not?
A. No, he did not.
Q. Stayed there all night with you?
A. No; he did not. Did he?
Q. Was it not agreed and understood between you and Mr. Matthews that he should not go to a hotel?
A. I won't say whether there was any such agreement or not, for I do not know whether there was or not. I remember now that Matthews did stay at my house that night; but it was accidental, my meeting Matthews. I met him at the depot. I went by the Grand Trunk road because I could not get back the other way, and we did not get in until just time enough to take a carriage and go to the depot and take the train and go home. There was an arrangement made at Elkhart in some way to take the passengers, so I took that train and went back to Chicago.
360 Q. Did you see Ayer on Sunday?
A. No, I did not.
Q. At the time of the failure here and the appointment of the receiver you had paid out no money at all for the account of Brown, Bonnell & Co. on these indorsements?
A. I took up that paper just as fast as it came due.
Q. But at the time of the failure, on the 17th of February, 1883, you had made no payment at all, had you?

A. I cannot say that; I cannot say whether I had or not. If there was any of that paper came due I took it up. I cannot swear to that, for I do not remember.

Q. The date of the maturity of the paper would demonstrate that fact?

A. That would show. I cannot tell how that was.

Q. Was the whole $80,000 of the bonds put in your hands at one time?

A. I think so.

361 A certified copy of the record of the court of common pleas of Mahoning county, Ohio, in the case of the Brier Hill Iron & Coal Co. *vs.* Brown, Bonnell & Co., No. 12987, is introduced in evidence, it being agreed that the other judgments in question are of the same description.

It is agreed that it appears from the original mortgage of Brown, Bonnell & Co. to Dan. P. Eells and John Hay, trustees, that neither the signature of Mr. Eells nor the signature of Mr. Hay is on the said original mortgage.

It is agreed that at the time of the institution of this action Dan. P. Eells and John Hay were, each of them, and that they still are, citizens of the State of Ohio, and that Brown, Bonnell & Co. is a corporation organized under the laws of Ohio.

The payment and satisfaction of the judgment in the case of the Negaunee Concentrating Company *vs.* Brown, Bonnell & Co., in the circuit court of the United States for the northern district of Ohio, is introduced in evidence by respondents to intervening petitioners:

362 BRIER HILL IRON & COAL CO. *vs.* BROWN, BONNELL & CO. } No. 12927, Appearance Docket 9.

Pleas before the Hon. William T. Spear, one of the judges of the court of common pleas in and for the county of Mahoning and State of Ohio, at a term of said court begun and held at the court-house, in the city of Youngstown, county and State aforesaid, on the third day in September, in the year of our Lord one thousand eight hundred and eighty-three.

Be it remembered that heretofore, to wit, on the twenty-second day of November, in the year of our Lord last aforesaid, the Brier Hill Iron and Coal Company, by its attorney, A. W. Jones, filed herein a certain petition against Brown, Bonnell & Company; which said petition follows in these words and figures, to wit:

STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

THE BRIER HILL IRON & COAL COMPANY, Plaintiff, }
vs.
BROWN, BONNELL & Co., Defendant. }

First cause.—The said Brier Hill Iron & Coal Company, plaintiff, says that both itself and defendant are duly incorporated
363 and organized companies under the laws of the State of Ohio, and that it complains of said defendant, Brown, Bonnell and Company, in a first cause of action, for that the said defendant, on the 5th day of December, A. D. 1888, at Youngstown, for value received, made its certain promissory note, in writing, of that date, a true copy of which promissory note, together with all the endorsements thereon, is in the words and figures following, to wit:

$5,250.00. YOUNGSTOWN, *Dec. 5th*, 1882.

Four months after date we promise to pay to the order of Brier Hill Iron & Coal Co. fifty-two hundred and fifty dollars, at Second National Bank here, value received.

BROWN, BONNELL & COMPANY,
By F. H. MATTHEWS, *Tr.*

—and that the said defendant then and there delivered the same to the said plaintiff and thereby promised to pay the said plaintiff or order, in four months from the date thereof, the sum of fifty-two hundred and fifty dollars, which period has since elapsed; yet the said defendant has not paid the said sum of money or any part thereof to the said plaintiff, although often requested so to do; and the said plaintiff further says that the full amount of fifty-two hundred and fifty dollars is now due thereon and wholly unpaid. It has never parted with the ownership of said promissory note, and that it is the legal holder and owner thereof.

Wherefore said plaintiff prays judgment against said defendant for said sum of fifty-two hundred and fifty dollars, which it claims, together with interest thereon, at the rate of six per cent., from the eighth day of April, A. D. 1883, on the first cause of action.

364 Second cause.—The said plaintiff, for a second cause of action, here adopts as though again repeated all the allegations of the first cause of action, and *defendant* complains of said defendant for that the said defendant, on the fifteenth day of December, A. D. 1883, at Youngstown, O., for value received, made its certain promissory note in writing of that date, a true copy of which promissory note, together with all endorsements thereon, is in the words and figures following, to wit:

$5,250.00. YOUNGSTOWN, *Dec. 15th*, 1882.

Four months after date we promise to pay to the order of Brier

Hill Iron & Coal Co. fifty-two hundred and fifty dollars, at Second National Bank here, value received.

BROWN, BONNELL & CO.,
By F. H. MATTHEWS, *Tr.*

—and that the said defendant then and there delivered the same to the said plaintiff, and thereby promised to pay the said plaintiff or order, in four months from the date thereof, the sum of fifty-two hundred and fifty dollars, which period has since elapsed; yet the said defendant has not paid said sum of money nor any part thereof to the said plaintiff, although often requested so to do; and the said plaintiff further says that the full amount of five thousand two hundred and fifty dollars is now due thereon and wholly unpaid. It has never parted with the ownership of said promissory note, and that it is still the legal owner and holder thereof. Wherefore plaintiff prays judgment against said defendant for said sum of fifty-two hundred and fifty dollars, which it claims, together with interest thereon, at the rate of six per cent., from the eighteenth day of April, A. D. 1883, on second count, or in all the sum of
365&366 ten thousand eight hundred and forty-six dollars and fifty cents.

A. W. JONES,
Plaintiff's Attorney.

STATE OF OHIO, }
Mahoning County, } *ss:*

A. W. Jones, being duly sworn, says that he believes the statements contained in the foregoing petition are true in substance and in fact, and that he is the attorney of said plaintiff in this action; that said action is brought upon an instrument in writing for the unconditional payment of money only; that said instrument in writing is now in his possession.

A. W. JONES.

Sworn to by said A. W. Jones before me and by him subscribed in my presence this 21st day of Nov., A. D. 1883.

E. M. WILSON,
[SEAL.] *Notary Public.*

On the twenty-second day of November, in the year of our Lord last aforesaid, answer was filed herein; which said answer follows in these words and figures, to wit:

STATE OF OHIO, }
Mahoning County, } *ss:*

In the Court of Common Pleas.

BRIER HILL IRON & COAL CO. }
vs.
BROWN, BONNELL & CO. }

The defendant now comes and, waiving the issue and service of

process, enters an appearance herein and admits that all the allegations of the petition are true, and consents that judgment may be entered as prayed in said petition.

BROWN, BONNELL & CO.,
By H. C. AYER, *President.*

HENRY CRAWFORD, *Attorney.*

367 Now, at this term of said court, being the September term of, in the year of our Lord last aforesaid—

"The above-named plaintiff now comes into court with its attorney, A. W. Jones, and also comes the defendants, Brown, Bonnell & Co., with H. Crawford, its attorney; whereupon this cause being at issue and neither party requiring a jury, the same is, by consent, tried and submitted to the court upon the petition of plaintiff, the answer of defendants, proofs, and exhibits. In consideration whereof the court finds that all the allegations of said petition are true; that said defendant is indebted to plaintiff upon the causes of action therein set forth, including interest to this date, in the sum of ten thousand eight hundred and forty-six dollars and fifty cents.

It is therefore considered and adjudged by the court, on this 22nd day of November, 1883, that the said plaintiff, The Brier Hill Iron & Coal Company, do recover from said defendants, Brown, Bonnell & Co., the said sum of ten thousand eight hundred and forty-six dollars and fifty cents and costs herein."

368 STATE OF OHIO, }
Mahoning County, } *ss:*

I, Lloyd Fording, clerk of the court of common pleas within and for said county, having the custody of the files, journals, and records of said court, do hereby certify that the foregoing is a true copy of the record of the case of the Brier Hill Iron & Coal Co. *vs.* Brown, Bonnell & Co., No. 12927, in said court, as the same appears upon the records of said court; and I further certify that I have carefully compared said foregoing copy with the original record, and that the same is a full and correct transcript thereof.

Witness my hand and the seal of said court, at Youngstown, this 4th day of August, A. D. 1884.

LLOYD FORDING, *Clerk.* [SEAL.]

369 And afterwards, to wit, on June 11, 1884, the following master's report was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON COMPANY }
vs. } Equity, No. 4195.
BROWN, BONNELL AND COMPANY. }

At the April term, A. D. 1883, this cause was referred to the under-

signed as a special master "to ascertain what is justly due from said defendant to each and every creditor who has filed his claim in accordance with the order of this court, and to adjudge and marshal the liens of said creditors and the priorities thereof, and to report his findings and adjudications to the court," &c. In accordance with the order I caused in each case in which the receiver made any contest as to the amounts due upon the petition of the creditor proper pleadings to be filed, and upon the issues so made I have heard such testimony as the parties produced, and made in every such case a special report as to the amount allowed, with reasons for such findings. I have made special reports of this character in the following cases, viz:

The Florence Mining Company, claim No. 84.
Henry O. Bonnell *et al.*, claim No. 131.
Job Evans, claim No. 164.
The Iron Cliffs Company, claim No. 170.

And I hereby make special reference to the reports made in these cases, and ask that the same be considered as a part of
370 this my general report. In very many other claims after comparing the proof filed by the petitioners with the books of the defendants and records on file in its office I was enabled to reach the conclusion satisfactory to the creditors, to the receiver representing the defendants, and to me, and in such cases I have not filed any special report but made a finding of the amount on the schedule hereinafter referred to in the claims of the following petitioning creditors, viz:

W. R. Erret, No. 71.
The Pittsburgh and Lake Erie R. R. Co., No. 92.
The Citizens' National Bank of Pittsburgh, Pa., No. 114.
The Imperial Coal Company, No. 122.
The Pittsburgh Steel Casting Company, No. 149.

Liens are claimed by attachment proceedings instituted and still pending in the courts of the United States and of the State of Pennsylvania in the latter State. As the result of such proceedings has not been proved and the validity of said liens established, I am not able to report any priority as existing in favor of said creditors.

In the claims of the following creditors, viz:

Commercial National Bank of Cleveland, No. 90.
Daniel P. Eells, No. 95.
William H. Harris, No. 96.
Charles A. Otis, No. 155.
Amasa Stone's estate, No. 157.

They claim to hold as collateral security bonds secured by a first mortgage upon all the property of the defendants. The validity of this mortgage is contested by other creditors, and upon the
371 issues so made, by the consent of all parties, pending negotiations amongst the creditors for a settlement of all these matters, I have, by such consent of all parties, suspended further hearing as to the validity of said mortgage, and in the schedule hereinafter referred to I have noted their claim as to liens without passing upon them.

In the following cases I have reported preferred claims, viz:

No. 67, Wilcox & Scaife for	$232 39
No. 123, Charles L. Mackey	14 60
No. 124, James Mackey	311 50

As to all other claims the amount claimed by the creditor, with the amount allowed by me, the nature of the claim, the number thereof, and the residence of the petitioners, is fully set forth in a Schedule "A," which is submitted herewith as a part of this report, and to which reference is made for full information as to each claim so filed. From this schedule it appears that the total claims filed by petitioning creditors number one hundred and seventy-seven — amount to the sum of $1,309,903.48.

The amount reported due by me upon said claims is	$1,235,819 40
The amount of interest on same to June 1st, 1884, allowed, is	84,830 52
Total amount of principal and interest allowed	$1,320,649 92

Said schedule and the several special reports made by me as aforesaid, together with all the evidence taken in connection therewith, are respectfully submitted herewith for the examination of the court and its further orders herein.

A. J. RICKS,
Special Master.

372 And afterwards, to wit, on June 18th, 1884, the following subpœna was issued in this cause, and which is in words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Eastern Division, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Brown, Bonnell & Company, if they may be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in September next, to answer a certain answer and cross-bill of the Commercial National Bank, C. A. Otis, William H. Harris, Dan. P. Eells, John Hay, and Samuel Mather, executors of the estate of Amasa Stone; Dan. P. Eells and John Hay, trustees, filed and exhibited in said court against them in the case in which The Lake Superior Iron Co. *et al.* are complainants and said Brown, Bonnell & Co. are defendants.

Hereof they are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the

United States, this 18th day of June, A. D. 1884, and in the 108th year of the Independence of the United States of America.

A. J. RICKS, *Clerk*,
By O. C. BEATTY,
Deputy Clerk.

MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of August, 1884; otherwise the said bill may be taken *pro confesso*.

A. J. RICKS, *Clerk*,
By O. C. BEATTY, *D. Clerk.*

372½ [Endorsed:] No. 4195. United States circuit court, northern district of Ohio, eastern division. In chancery. Lake Superior Iron Co. *et al. vs.* Brown, Bonnell & Company. Subpœna. Returnable first Monday of August, 1884. Rule day for appearance, first Monday of Aug., 1884. Rule day for answer, first Monday of Sept., 1884. Returned and filed June 24th, 1884. A. J. Ricks, clerk. A. St. John Newbury, solicitor Com'l Nat'l B'k *et al.*

NORTHERN DISTRICT OF OHIO, *ss:*

On the 23 day of June, 1884, at Youngstown, Ohio, I made due service of this writ on the within-named Brown, Bonnell & Company by delivering to Ralph J. Wick, secretary and treasure- thereof, a true and duly certified copy of this writ, the president and vice-president being absent and could not be found.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

Fees:

Service	2 00
Copy	50
Actual ex.	5 10
	$7 60

373 And afterwards, to wit, on the 19th day of June, 1884, the following exceptions *was* filed in this cause, and which *is* in words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY.

Exceptions to the Report of the Special Master upon the Claim of the Iron Cliffs Company.

Now comes Fayette Brown, receiver, by Francis J. Wing, his so-

licitor, and excepts to the finding and report of A. J. Ricks, Esq., special master, upon the claim of said Iron Cliffs Company against said Brown, Bonnell & Company in the respects and *further* reasons following:

First. In finding that the Iron Cliffs Company is entitled to an allowance of the damages against Brown, Bonnell and Company, which is the difference between the contract price of the undelivered ore and the same realized from the sale of the undelivered balance at the market price and the value of the 339 — 40 tons of ore unsold at $4.50 per ton.

FRANCIS J. WING, *Solicitor.*

374 And afterwards, to wit, on Saturday, July 26th, 1884, the following order was entered in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } 4195, Chancery.

This cause came on to be heard before the Honorable John Baxter, circuit judge, and Honorable Martin Welker, district judge, upon the exceptions of the Florence Mining Company to the report of the special master upon the claim of said Florence Mining Company, as set forth in its petition, as one of the creditors of Brown, Bonnell & Company, and upon the testimony filed therewith, and the same was argued by counsel, and thereupon it is ordered that said exceptions be overruled, and that the report of said special master be confirmed, and that the amount of the claim of said Florence Mining Company, as one of the creditors of said defendant, Brown, Bonnell & Company, be fixed at the sum of $61,715.00, being the amount so found by said special master, together with interest on the same to June 1st, 1884, to be paid as may hereafter be ordered by the court in the further hearing of this cause, from which order and decree of the court the said Florence Mining Company prays an appeal to the next term of the Supreme Court of the United States, which is allowed upon the said Florence Mining Company executing its bond, conditioned as provided by law, in the sum of $600.00.

375 And afterwards, to wit, on Saturday, Oct. 11, 1884, the following order was entered in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } 4195, Chancery.

This cause came on to be heard at this term upon the report of A. J. Ricks, Esq., special master, filed in this court on the 11th day of June, 1884, including the schedule filed therewith and made a part thereof; and, there being no exceptions filed thereto, the court

upon hearing *after* argument of counsel, ordered that said report, with said schedule as a part thereof, be, and the same is hereby, confirmed; and it is ordered that the amounts of the claims in said report, including said schedule, be, and the same are hereby, fixed and found against said Brown, Bonnell & Co. in favor of the persons and corporations and in the amounts therein named, together with interest on the same to the 1st day of June, 1884, being the amounts and interest and persons and corporations found by said special master, the same to be paid as may be hereafter ordered by the court on the further hearing of this cause.

376 And afterwards, to wit, on the 11th day of Sept., 1884, the following order was entered in the order book in this cause, and which is in words and figures following, to wit:

THE LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY *et al.* } Chancery.

In this — it appearing that the defendant, Brown, Bonnell & Company, has failed to plead, answer, or demur to the answer and cross-bill or intervening petition of the Commercial National Bank and others, it is ordered, on motion of the solicitor for said Commercial National Bank and others, that all and singular the allegations contained in said answer and cross-bill or intervening petition be taken as confessed by said defendant, Brown, Bonnell & Co., and that an order *pro confesso* be entered against said defendant.

Sept. 11th, 1884.

A. ST. J. NEWBERRY,
Solicitor for the Commercial National Bank and Others.

377 And afterwards, to wit, on May 4, 1884, the following motion was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States within and for the Northern District of Ohio, Eastern Division.

THE LAKE SUPERIOR IRON COMPANY *et al.*, Complainants,
vs.
BROWN, BONNELL AND COMPANY, Defendants. } Motion.

The undersigned, creditors of Brown, Bonnell & Company, in whose names an answer was filed on the — day of ——, A. D. 1884, to the intervening petition of the Commercial National Bank of Cleveland *et al.* in said suit, now come and respectively and separately move that their names be stricken from said answer, that as to them said answer may be withdrawn from the files of this court, and hereby waive said answer and consent that a decree may be

entered in favor of the said intervening petitioners in said intervening petition named.

THE MANUFACTURERS' AND TRADERS' BANK OF BUFFALO, N. Y.
THE FIRST NATIONAL BANK OF YOUNGSTOWN, OHIO.
THE SHARON NATIONAL BANK.
WESTERMAN, FILER & CO.
BRIER HILL IRON & COAL COMPANY.
THE SECOND NATIONAL BANK OF YOUNGSTOWN,
By C. D. HINE AND C. C. BALDWIN, *Their Attorneys.*
THE FLORENCE MINING COMPANY,
By HARVEY D. GOULDER, *Its Attorney.*

Indorsed: Motion of Manufacturers' & Traders' Bank *et al.* Filed May 4, 1885. A. J. Ricks, clerk U. S. circuit court.

378 And afterwards, to wit, on May 9, 1885, the following order was entered in this cause, and which is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio.

LAKE SUPERIOR IRON CO. *et al.* *vs.* BROWN, BONNELL AND COMPANY. } Chancery, No. 4195.

SATURDAY, *May 9th*, 1885.

In this cause, on the application of the Manufacturers' and Traders' Bank of Buffalo, New York; the First National Bank of Youngstown, Ohio; the Sharon National Bank, Westerman, Filer & Co., Andrews & Hitchcock, Brier Hill Iron & Coal Co., the Second National Bank of Youngstown, and the Florence Mining Co., it is ordered that they have leave to withdraw their names from the answer to the intervening petition of the Commercial National Bank of Cleveland, Ohio, filed herein on first day of March, 1884, and that as to them said answer be withdrawn from the files.

379 And afterwards, to wit, on May 2, 1885, the following exceptions were filed in this cause, and which *is* in words and figures following, to wit:

In the Circuit Court of the United States within and for the Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.* *vs.* BROWN, BONNELL & COMPANY. } In Chancery. No. 4195.

The Commercial National Bank of Cleveland, Dan. P. Eells, Charles A. Otis, William H. Harris, John Hay, and Samuel Mather,

executors of the estate of Amasa Stone, deceased, now come and jointly and severally except to the report of the special master, filed in this cause May 2nd, 1885, in this, to wit:

The master reports among his findings of fact that these exceptors or some of them "agreed not to place the mortgage securing said bonds upon record."

And these exceptors say that such finding of fact is against the weight of the evidence taken by said master, and is not supported by any evidence.

A. ST. J. NEWBERRY,
C. C. BALDWIN,
Att'ys for Exceptors.

Indorsed: Exceptions of Commercial National Bank *et al.* to report of special master, filed May 2nd, 1885. Filed May 29, 1885. A. J. Ricks, clerk U. S. circuit court.

380 & 381 And afterwards, to wit, on June 1st, 1885, the following exceptions *was* filed in this cause, and which *is* in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio.

THE LAKE SUPERIOR IRON COMPANY & Others
vs.
BROWN, BONNELL & Co. } Equity.

In the matter of the intervening petition of the Commercial National Bank of Cleveland, Ohio, and others and the response of creditors thereto.

Exceptions to the Report of the Special Master.

Exceptions taken by Charles S. Worden, the Leadville Coal Company, in behalf of themselves and all other creditors of the corporation of Brown, Bonnell & Co., to the report filed herein on May 2, 1885, by the special master.

First. For that the said master found and reported that "when the bonds were executed and deposited with the trustees it was for the purpose and in expectation of so negotiating their sale in due course of time as the money might from time to time be needed," whereas the testimony shows and the master should have found that none of said bonds were ever executed or deposited with the trustees until after the understanding among a portion of the directors that the said bonds were to be delivered to them to secure their endorsements.

Second. For that the said master found and reported that "in this emergency its board of directors held several meetings, and it was finally agreed among those of them largely interested in the company that they would each individually indorse its notes to the ex-

tent of $50,000 and each take as collateral security an agreed
382 number of said bonds," whereas the evidence shows and the master should have found that the board of directors did not meet or have any agreement or understanding on such subject, but that the said parties possessed themselves of said bonds, which they now claim as collateral, without any order or resolution of the board, but solely by reason of an understanding between themselves as individuals, and in such a manner as not to be binding either on the corporation or its creditors.

Third. For that the said master found and reported that "the bonds were therefore validly created and executed," whereas the testimony shows that the said bonds were fraudulently executed in pursuance solely of the said before-mentioned illegal arrangement made between a portion of the directors, and the master should have so reported.

Fourth. For that the said master found and reported "that the board of directors believed and had reasonable ground to believe that it would continue solvent and be able to pay the notes to secure the payment of which the bonds were pledged," whereas the testimony shows, and the master should have so reported, that the board of directors did not pledge said bonds or make any agreement whatever on the subject, and that some of the board did not ever have any knowledge on the subject.

Fifth. For that the said master found and reported "it would not be a fair conclusion from the evidence before me to say that said failure was anticipated or that said mortgage was kept from record for the purpose of creating a fictitious credit in expectation thereof," whereas the testimony shows, and the master should have so reported, that the sole reason and purpose of keeping the said mortgage off the record was expressly declared to be to protect
383 and sustain the existing credit of the corporation, which would have been ruined if the said mortgage had been placed on the records or become known; and the said master should further have found and reported that it was expressly agreed by the directors and the petitioners that the existence of said mortgage should be kept secret from all other creditors.

Sixth. For that the said master found and reported that "I am therefore of the opinion, and so report, that said mortgage is valid and in full force, and the bonds now held by said parties in pledge are a valid lien of equal rank upon the property of the defendant to the amount of the notes and interest to secure which they were pledged," whereas the evidence shows, and the master should have reported, that there was no valid or enforceable pledge of any of said bonds by the said corporation, and that the secret hypothecation of bonds to said directors who agreed among themselves to keep said mortgage unrecorded and secret was fraudulent and invalid as against all creditors.

Seventh. For that the said master should have reported that the several judgments set out in the response filed by creditors were and are each of them valid liens upon all the real estate of Brown, Bonnell & Co. prior to the lien of said mortgage.

Eighth. For that the said master should have reported that the (30) thirty bonds held by the Commercial National Bank of Cleveland were not a lien upon any of the property of Brown, Bonnell & Co. for any sum whatever.

Ninth. For that the said master should have reported that the sixteen bonds held by Daniel P. Eells were not a lien upon any
384 of the property of Brown, Bonnell & Co. for any sum whatever.

Tenth. For that the said master should have reported that the sixteen bonds held by W. H. Harris were not a lien upon any of the property of Brown, Bonnell & Co. for any sum whatever.

Eleventh. For that the said master should have reported that the sixteen bonds held by Charles A. Otis were not a lien upon any of the property of Brown, Bonnell & Co. for any sum whatever.

Twelfth. For that said master should have reported that the sixteen bonds held by John Hay and Samuel Mather, executors of Amasa Stone, were not a lien upon any of the property of Brown, Bonnell & Co. for any sum whatever.

Wherefore these exceptants pray that said report should be rejected, and they have decreed accordingly.

HENRY CRAWFORD, *Solicitor.*

[Endorsed:] 4195. U. S. circuit court, N. district of Ohio. Lake Superior Iron Company and others *vs.* Brown, Bonnell & Co. Copy of exceptions to master's report on reference of the petition of the Com. Nat. B'k and others. C. C. Baldwin. Filed June 1, 1885. Henry Crawford, sol.

385 And afterwards, to wit, on June 2, 1885, the following additional exceptions was filed in this cause, and which is in words and figures following, to wit:

Additional Exception to Master's Report.

Circuit Court of the U. S., Northern District of Ohio.

THE LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL & CO. } Equity.

Thirteenth. For that the said master reported "that on the third day of April, A. D. 1882, Brown, Bonnell & Co., after proper corporate legislation by its board of directors, executed an instrument in the nature of a deed of trust, but generally referred to as a mortgage, conveying to Dan. P. Eells and John Hay, as trustees, substantially all of its real property."

Whereas the evidence shows that there was no proper corporate legislation to authorize the execution of said deed of trust to said Eells and Hay, and the master should have so found and reported.

HENRY CRAWFORD, *Solicitor.*

[Endorsed:] No. 4195. U. S. circuit court, N. district of Ohio. Lake Superior Iron Company and others *vs.* Brown, Bonnell & Co. Copy of additional exception to report of special master. C. C. Baldwin. Filed June 2, 1885. Henry Crawford, sol.

386 And afterwards, to wit, on July 13, 1883, the following motion was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States within and for the Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.* *vs.* BROWN, BONNELL AND COMPANY *et al.* } In Chancery. No. 4195.

Now come the Commercial National Bank of Cleveland, Dan. P. Eells, Wm. H. Harris, Charles A. Otis, and John Hay and Samuel Mather, executors of the estate of Amasa Stone, and move the court to strike from the files the exceptions heretofore filed herein by Charles S. Worden and the Leadville Coal Company to the report of the special master filed herein May 2nd, 1885, and for cause thereof say that neither of the said exceptors are answering creditors authorized under the former orders of this court to file exceptions to said report.

A. ST. J. NEWBERRY,
C. D. HINE,
C. C. BALDWIN,
Att'ys for Motion.

Indorsed: Motion to strike off exceptions of Charles S. Worden *et al.* Filed July 13, 1885.

387 And afterwards, to wit, on July 22, 1885, the following joinder was filed in this cause, and which is in words and figures following to wit:

Circuit Court of the U. S., Northern District of Ohio.

LAKE SUPERIOR IRON CO. & OTHERS *vs.* BROWN, BONNELL & CO. } In Equity.

The defendant corporation, Brown, Bonnell & Co., and the Shenango Coal Company join in the exceptions heretofore filed by the Leadville Coal Company and Charles S. Worden, and do adopt and urge the same and each and every of such exceptions as fully and to the same *except* as if such exceptions were herein set forth.

These exceptants further move to set aside such master's report because—

1st. The evidence shows the court has no jurisdiction.
2. The order of reference is void.

HENRY CRAWFORD,
A. W. JONES, *Solicitors.*

Indorsed: Joinder in exceptions by Brown, Bonnell & Co. & Shenango Coal Co. Filed July 22, 1885. A. J. Ricks, clerk U. S. circuit court.

388 And afterwards, to wit, on the 15 of Sept., 1885, the following motion was filed in this cause, and which is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & COMPANY. } In Chancery. No. 4195.

Now come the Commercial National Bank of Cleveland, Dan. P. Eells, William H. Harris, Charles A. Otis, and John Hay and Samuel Mather, executors, &c., and move the court to strike from the files the response filed herein by Charles S. Worden to the intervening petition of these movers aforesaid, and for cause thereof say that the said Charles S. Worden was not authorized to file the same under the former order of this court.

A. ST. J. NEWBERRY,
C. D. HINE,
C. C. BALDWIN,
Solicitors for Motion.

Indorsed: Motion of Commercial National Bank *et al.* to strike from files. Filed Sep. 15, 1885.

389 And afterwards, to wit, on the 15 day of Sept., 1885, the following motion was filed in this cause, and which is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & CO. } In Chancery. No. 4195.

Now come the Commercial National Bank of Cleveland, Dan. P. Eells, William H. Harris, Charles A. Otis, and John Hay and Samuel Mather, executors, &c., and move the court to strike from the files the (so-called) "joinder in exceptions," filed herein by the de-

fendant and the Shenango Coal Company July 22nd, 1885, and for cause thereof say that neither of the said parties filed any response to the intervening petition of these movers nor opposed the same; that said "joinder" is filed without leave of court, and that neither of said parties has any right or authority to file exceptions herein.

A. ST. J. NEWBERRY,
C. D. HINE,
C. C. BALDWIN,
Sol'rs for Motion.

Indorsed: Motion of Commercial National Bank *et al.* to strike from files. Filed Sept. 15, 1885.

390 And afterwards, to wit, on the 24 day of Sept., 1885, the following decree was entered in this cause, and which is in words and figures following, to wit:

United States Circuit Court, Northern District of Ohio.

THURSDAY, *September 24th*, 1885.

Present: The Honorable John Baxter, circuit judge.

LAKE SUPERIOR IRON CO. *et al.*
vs.
BROWN, BONNELL & CO. } Chancery, No. 4195.

In the matter of the exceptions of the Leadville Coal Company and others to the report of the special master on the intervening petition of the Commercial National Bank and others.

This cause having come on to be heard upon the exceptions to the report of the special master, filed herein on May 2nd, 1885, was argued by counsel, and thereupon, upon consideration, the court, being of the opinion that the directors of the defendant corporation and said Commercial National Bank of Cleveland, Ohio, under the facts in said report, which the court finds to be true, did not acquire any lien or priority under said mortgage over other creditors, doth order, adjudge, and decree that the exceptions to said report be sustained and said report be set aside, and that said intervening petition, so far as it seeks to maintain a lien and priority in favor of the intervenors over other creditors under said mortgage therein set forth, be dismissed, but be retained for such further relief and
391 protection as said intervenors may be entitled to in this cause, and that the matter of costs of this hearing and proceeding be reserved for further order of the court; and counsel interested in this proceeding having agreed that five hundred — will be a reasonable compensation to said special master, A. J. Ricks, for his services in this cause, it is ordered that the receiver pay to said master said sum out of the funds now in his hands, together with the further sum of $97.90, due the stenographer for reporting testimony on this reference.

392 And afterwards, to wit, on September 26, 1885, the following order was entered in this cause, and which is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio.

SATURDAY, *September* 26*th*, 1885.

Present: The Honorable John Baxter, circuit judge.

LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL AND COMPANY. } Chancery, No. 4195.

It is hereby ordered that Fayette Brown, heretofore appointed receiver herein, proceed to take an account of the plant of the defendant company that has come into his possession as such receiver, and also generally of all property connected therewith that has come into his possession as such receiver, other than manufactured product and supplies, and make report to this court definitely describing such property as soon as practicable.

393 And afterwards, to wit, on the 20 day of Nov., 1885, the following receiver's report was filed in this cause, and which is in words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNEL AND COMPANY.

In compliance with the order of this court made September 26, 1885, I respectfully submit the following account of the plant of Brown, Bonnel & Co. that has come into my hands as receiver, and also all property connected therewith other than manufactured product and supplies.

Schedule A shows and describes the real estate.

Schedule B the property connected therewith other than manufactured product and supplies.

SCHEDULE A.

The land of Brown, Bonnell & Co. having been acquired at different times and by different deeds, it is convenient to describe them in parcels.

1st parcel is part of lot No. 10, in the east division of outlots in the original town plat of Youngstown, and is bounded as follows: Beginning at a post on the east line of the highway to Gibson's Ford-

ing and fifteen feet from common water-mark in the Penn-
394 sylvania and Ohio canal, running thence south on the east line of said road 16 rods; thence east 10 rods; thence north 16 rods; thence west on the bank of said canal 15 feet from common water-mark 10 rods to the place of beginning, containing one acre of land.

The second parcel is also a part of said outlot No. 10, and is bounded as follows: Beginning at the southeast corner of the first parcel 15 feet from the top water-line of the said canal, running thence south 18 rods and 23 links to the Mahoning river; thence eastwardly on the north bank of said river 18 rods and 12 links to a post near the outlet of a ditch; thence north parallel with the east line of the first parcel 16 rods and 21 links to the bank of said canal, and thence on the bank of said canal N. 86½ degrees west 18 rods to the place of beginning, containing about two acres and seventeen perches.

The third parcel is bounded as follows: Beginning at low-water mark on the north bank of the Mahoning river and on the east line of the second parcel, on which stands the Falcon furnace, running thence north on the east line of the second parcel to a stake fifteen feet from the water in said canal; thence eastwardly along the bank of said canal, keeping 15 feet from the water therein, to a point such that if a line were drawn from it southerly parallel with the first-named boundary line of this parcel so as to meet a line drawn eastwardly along the bank of said river from the place of beginning there would be contained within said boundary lines one acre of ground, and said parcel has for its boundary lines the said four described lines.

The fourth parcel is known as part of lot No. 1, in the orig-
395 inal survey of the south division of outlots in the town plat of Youngstown, and is bounded on the northerly side by the outer line of the towing-path of said canal, on the easterly side by the highway or street leading to the Mahoning bridge, on the southerly side by the Mahoning river, and on the westerly side by the west line of said lot No. 1, which is also the east line of lands formerly owned by the late William Rayen, deceased.

The fifth parcel is bounded as follows: Beginning at the northwest corner of a lot known as the Phœnix Furnace lot and at a point 15 feet south of the common water-mark in said canal; thence running south 29¼ degrees W. 8 chains and thirty-five links to low-water mark on the north bank of the Mahoning river; thence N. 82¾ degrees W. 6 chains 7½ links; thence N. 29¼ degrees E. 3 chains 30⅓ links; thence N. 60¾ degrees W. 1 chain 89½ links; thence N. 29¼ degrees E. 5 chains 30 links to an iron stake 15 feet south of top water-line of said canal; thence S. 73 degrees E. 1 chain 72 links; thence S. 76¾ degrees E. 6 chains 4 links to the place of beginning, containing about 5.924 acres.

The sixth parcel is bounded and described as follows: Beginning at a point on the north line of the right of way and lands formerly belonging to the Pennsylvania and Ohio Canal Company, where said line is met by the west line of the east half of lot No. 33 of Bane

and Wick's subdivision of a part of the south division of outlots in the town plat of Youngstown, thence running northerly along said west line to the south line of the north half of said lot 33; thence westerly along said south line and parallel with Bane street to the west line of said lot 33; thence northerly along said west line of
396 said lot 30 feet; thence easterly parallel with Bane street to the west line of the east half of said lot; thence northerly along the west line of said east half of said lot 12 feet; thence easterly parallel with Bane street to the east line of said lot 33; thence northerly along said east line of said lot to the south line of said Bane street; thence easterly along the south line of Bane street to a point where said south line of Bane street would be met by the production southerly of the east line of Walnut street; thence northerly along the southerly production of said east line and along the east line of Walnut street to the northwest corner of lot No. 21 of said Bane and Wick's subdivision; thence easterly parallel with Bane street to the northeast corner of lot No. 16 of Bane and Wick's said subdivision; thence easterly along the south line of an alley to the west line of Presque Isle street; thence southerly along said west line last named to the north line of the right of way and lands formerly belonging to said canal company, and thence westerly along said north line of said right of way and lands last named to the place of beginning.

The seventh parcel is a part of lot No. 252 of the latest numbering of lots in said city, and is bounded as follows: Beginning at the southeast corner of said lot; thence running northerly along the east line thereof 18 feet; thence by a southwesterly course to a point on the south line of said lot distant westerly forty-five and one-half feet from the southeast corner of said lot; thence easterly along the south line of said lot 45½ feet to the place of beginning.

The eighth parcel is bounded as follows: Beginning at a point on the east line of Presque Isle street S. 2½ degrees W. 26
397 links from the southwest corner of a lot conveyed to Brown, Bonnell & Company by C. H. Andrews *et al.* by a deed which is recorded in the records of said county, in vol. 20, at page 84 *et seq.*, thence running S. 2½ degrees W. along said east line of said street 20 feet; thence south 81½ degrees E. 1 chain and 52 links; thence N. 4 degrees E. 20 feet; thence N. 81½ degrees W. one chain and 53 links to the place of beginning.

The ninth parcel is that part of lot No. 33 which was conveyed to Andrews & Hitchcock 2nd July, 1860, by David Tod, and is bounded as follows: Beginning at a stake on the line between said lot and lot 32 1 chain 68 links S. 29½ degrees W. from the south line of Front street, thence running S. 29½ degrees W. 95 links to the canal; thence up said canal 49 links; thence N. 4 degrees E. 1 chain 50 links; thence S. 82¼ degrees E. 31 links; thence S. 87¾ degrees E. 58 links to the place of beginning.

The 10th parcel is that part of outlot No. 32 of the southeast division of outlots in the former village of Youngstown which on the 12th September, 1859, was conveyed by J. Warner to Andrews & Hitchcock, and is bounded as follows: Beginning at a stake where the west line of said lot 32 meets the berme bank of said canal,

ing and fifteen feet from common water-mark in the Penn-
394 sylvania and Ohio canal, running thence south on the east line of said road 16 rods; thence east 10 rods; thence north 16 rods; thence west on the bank of said canal 15 feet from common water-mark 10 rods to the place of beginning, containing one acre of land.

The second parcel is also a part of said outlot No. 10, and is bounded as follows: Beginning at the southeast corner of the first parcel 15 feet from the top water-line of the said canal, running thence south 18 rods and 23 links to the Mahoning river; thence eastwardly on the north bank of said river 18 rods and 12 links to a post near the outlet of a ditch; thence north parallel with the east line of the first parcel 16 rods and 21 links to the bank of said canal, and thence on the bank of said canal N. 86½ degrees west 18 rods to the place of beginning, containing about two acres and seventeen perches.

The third parcel is bounded as follows: Beginning at low-water mark on the north bank of the Mahoning river and on the east line of the second parcel, on which stands the Falcon furnace, running thence north on the east line of the second parcel to a stake fifteen feet from the water in said canal; thence eastwardly along the bank of said canal, keeping 15 feet from the water therein, to a point such that if a line were drawn from it southerly parallel with the first-named boundary line of this parcel so as to meet a line drawn eastwardly along the bank of said river from the place of beginning there would be contained within said boundary lines one acre of ground, and said parcel has for its boundary lines the said four described lines.

The fourth parcel is known as part of lot No. 1, in the orig-
395 inal survey of the south division of outlots in the town plat of Youngstown, and is bounded on the northerly side by the outer line of the towing-path of said canal, on the easterly side by the highway or street leading to the Mahoning bridge, on the southerly side by the Mahoning river, and on the westerly side by the west line of said lot No. 1, which is also the east line of lands formerly owned by the late William Rayen, deceased.

The fifth parcel is bounded as follows: Beginning at the northwest corner of a lot known as the Phœnix Furnace lot and at a point 15 feet south of the common water-mark in said canal; thence running south 29¼ degrees W. 8 chains and thirty-five links to low-water mark on the north bank of the Mahoning river; thence N. 82¾ degrees W. 6 chains 7½ links; thence N. 29¼ degrees E. 3 chains 30⅓ links; thence N. 60¾ degrees W. 1 chain 89½ links; thence N. 29¼ degrees E. 5 chains 30 links to an iron stake 15 feet south of top water-line of said canal; thence S. 73 degrees E. 1 chain 72 links; thence S. 76¾ degrees E. 6 chains 4 links to the place of beginning, containing about 5.924 acres.

The sixth parcel is bounded and described as follows: Beginning at a point on the north line of the right of way and lands formerly belonging to the Pennsylvania and Ohio Canal Company, where said line is met by the west line of the east half of lot No. 33 of Bane

and Wick's subdivision of a part of the south division of outlots in the town plat of Youngstown, thence running northerly along said west line to the south line of the north half of said lot 33; thence westerly along said south line and parallel with Bane street to the west line of said lot 33; thence northerly along said west line of
396 said lot 30 feet; thence easterly parallel with Bane street to the west line of the east half of said lot; thence northerly along the west line of said east half of said lot 12 feet; thence easterly parallel with Bane street to the east line of said lot 33; thence northerly along said east line of said lot to the south line of said Bane street; thence easterly along the south line of Bane street to a point where said south line of Bane street would be met by the production southerly of the east line of Walnut street; thence northerly along the southerly production of said east line and along the east line of Walnut street to the northwest corner of lot No. 21 of said Bane and Wick's subdivision; thence easterly parallel with Bane street to the northeast corner of lot No. 16 of Bane and Wick's said subdivision; thence easterly along the south line of an alley to the west line of Presque Isle street; thence southerly along said west line last named to the north line of the right of way and lands formerly belonging to said canal company, and thence westerly along said north line of said right of way and lands last named to the place of beginning.

The seventh parcel is a part of lot No. 252 of the latest numbering of lots in said city, and is bounded as follows: Beginning at the southeast corner of said lot; thence running northerly along the east line thereof 18 feet; thence by a southwesterly course to a point on the south line of said lot distant westerly forty-five and one-half feet from the southeast corner of said lot; thence easterly along the south line of said lot 45½ feet to the place of beginning.

The eighth parcel is bounded as follows: Beginning at a point on the east line of Presque Isle street S. 2½ degrees W. 26
397 links from the southwest corner of a lot conveyed to Brown, Bonnell & Company by C. H. Andrews *et al.* by a deed which is recorded in the records of said county, in vol. 20, at page 84 *et seq.*, thence running S. 2½ degrees W. along said east line of said street 20 feet; thence south 81½ degrees E. 1 chain and 52 links; thence N. 4 degrees E. 20 feet; thence N. 81½ degrees W. one chain and 53 links to the place of beginning.

The ninth parcel is that part of lot No. 33 which was conveyed to Andrews & Hitchcock 2nd July, 1860, by David Tod, and is bounded as follows: Beginning at a stake on the line between said lot and lot 32 1 chain 68 links S. 29½ degrees W. from the south line of Front street, thence running S. 29½ degrees W. 95 links to the canal; thence up said canal 49 links; thence N. 4 degrees E. 1 chain 50 links; thence S. 82¼ degrees E. 31 links; thence S. 87¾ degrees E. 58 links to the place of beginning.

The 10th parcel is that part of outlot No. 32 of the southeast division of outlots in the former village of Youngstown which on the 12th September, 1859, was conveyed by J. Warner to Andrews & Hitchcock, and is bounded as follows: Beginning at a stake where the west line of said lot 32 meets the berme bank of said canal,

running thence N. 29½ degrees E. 95 links; thence S. 85 degrees E. 1 chain 23 links; thence S. 28½ degrees W. 80 links; thence S. 89 degrees W. 1 chain 30 links to the place of beginning.

The eleventh parcel is the south part of city lot No. 281 of the latest numbering of lots in said city, and is bounded as follows:

398 Beginning at a point on the east line of Presque Isle — S. 2½ degrees W. 2 chains 78¼ links from the southeast corner of Front and Presque Isle streets, thence running along the east line of Presque Isle street S. 2½ degrees W. 26 links; thence S. 79¾ degrees E. 1 chain 53 links; thence N. 4 degrees E. 21 links; thence N. 77 degrees W. 1 chain 55 links to the place of beginning.

The 12th parcel is known as city lot No. 280 of the latest numbering of lots in said city, and is bounded as follows: Beginning at a point on the east line of Presque Isle street S. 21½ degrees W. 20 feet from the southwest corner of said lot 281, thence running along the east line of said street S. 21½ degrees W. 65½ links to said canal; thence along the north side of high water in said canal S. 83½ degrees E. 1 chain 50 links; thence N. 4 degrees E. 52⅙ links; thence N. 79⅜ degrees W. 1 chain 52 links to the place of beginning.

The thirteenth parcel is all the land which was conveyed on the 5th December, 1863, by William Lindsay *et ux.* to the firm of Brown, Bonnell & Co. by deed which is recorded in said records in vol. 28, at page 233 *et seq.*, which deed is here referred to.

The fourteenth parcel is all the land ever owned or occupied by the Pennsylvania & Ohio Canal Company, which lies between the centre of Crab creek on the east and the east side of what is known as Rany's mill on the west, including between said east and west boundaries all of the land ever occupied by berme bank, water channel, and towing-path of said canal.

The fifteenth parcel comprises all the lands conveyed to the firm

399 of Brown, Bonnell & Co. by Henry Manning on the 28th November, 1863, by a deed recorded in said records in vol. 19, at page 711, except such part of said lands as lies in the fourteenth parcel, and including all such rights as were conveyed by said Henry Manning in his said deed, which is here referred to.

The fifteen parcels above named were conveyed on the 9th day of October, 1875, by Joseph H. Brown *et al.* to the party of the first part by a deed which is recorded in the records of said county in vol. 38, at page 606 *et seq.*, and is here referred to.

The sixteenth parcel is the west half of the south half of lot No. 33, in Bane and Wick's said subdivision, and also all of lot No. 32, in said subdivision, except such part of said lot No. 32 as was sold by Almon Raney and wife and Bostwick Raney to Ellen Ferrall, and except also such part of said lot 32 as was conveyed by said Almon Raney and wife and Bostwick Raney to Ann McGraw by a deed which is recorded in the records of said county in vol. 19, at page 493. Said sixteenth parcel was conveyed to said corporation 9th October, 1879, by H. O. Bonnell *et ux.* by a deed recorded in said records in vol. 45, at page 352.

The seventeenth parcel is the north half of the west half of lot No.

33 of said Bane and Wick's subdivision, excepting so much thereof as was conveyed away by George A. Young prior to 24th March, 1880. The part conveyed of said north half was conveyed to said corporation by A. W. Jones *et ux.* 24th April, 1880, by a deed recorded in said records in vol. 47, at page 384, and this seventeenth parcel shall contain as a part thereof all the interest conveyed by said Jones in said deed to said corporation in any other part of
400 said lot 33 of said subdivision.

The eighteenth parcel contains all that part of lot 275 of the latest enumeration in said city, which was conveyed to said corporation by Mary Degen *et al.* 24th November, 1880, by a deed which is recorded in said records in vol. 48, at page 98.

The nineteenth parcel is city lot No. 574 of the latest enumeration in said city, and was conveyed to said corporation 3rd January, 1881, by John Rigney *et ux.* by deed recorded in the records of said county in vol. 45, at page 583.

The twentieth parcel is lot No. 572 of the latest enumeration in said city, and was conveyed 8th February, 1881, to said corporation by Bryan Kennedy *et al.* by a deed recorded in said records in vol. 49, at page 14.

The twenty-first parcel is lot No. 571 of the latest enumeration in said city, and was conveyed 22nd February, 1881, to said corporation by E. M. Wilson, administrator of Patrick Corrigan, by a deed recorded in the said records in vol. 48, at page 291.

The twenty-second parcel is the east half of lot No. 580 of the latest enumeration in said city, and was conveyed to said corporation 19th March, 1881, by Christian Ludd *et al.* by a deed recorded in said records in vol. 49, at page 93.

The twenty-third parcel is the northwest part of original lot No. 11, as shown by plat of village lots of Youngstown made by Dr. Henry Manning and recorded in Mahoning County Records of Plats, vol. 1, page 51, bounded as follows: Commencing at the northwest corner of said lot No. 11, thence N. 74½ degrees E. 1 chain to lot owned by M. Fee and now known as city lot 582, new num-
401 bers; thence south two chains 71½ links; thence west 98 links to the east line of original lot No. 12; thence N. ½ degree E. 2 chains 44½ links to the place of beginning, containing about one-fourth of an acre of land, and was conveyed 1st July, 1881, to said corporation by Thomas George *et ux.* by a deed recorded in said records in vol. 249, at page 393.

The twenty-fourth parcel is the west half of lot No. 580 of the latest enumeration in said city, and is the same land which was conveyed to said corporation 1st July, 1881, by Catharine Scanlon *et al.* by a deed recorded in said records in vol. 49, at page 392.

The twenty-fifth parcel is part of a larger parcel of ground conveyed to John Stambaugh, trustee, by W. S. Parmelee, trustee, 31st July, 1871, by a deed recorded in said records in Deed Book 31, at page 273 *et seq.*, and is bounded and described as follows: Beginning on the east line of said larger parcel at the middle of a stone monument standing at the northeast corner of a piece of ground conveyed by the Liberty & Vienna Railroad Company to the Ashtabula,

Youngstown & Pittsburgh Railroad Company by a deed dated 25th August, 1871, and recorded in said records in vol. 33, at page 463 *et seq.*, thence running along the east line of said larger parcel conveyed as aforesaid by W. S. Parmelee, trustee, N. 30 degrees 28 minutes east about 398 7/10 feet to a stone monument at a point 15 feet southerly from the line of high-water mark on the south side of the Pennsylvania & Ohio canal; thence, along a line parallel with and distant fifteen — southerly from the said line of high-water mark on the south side of said canal, N. 49 degrees 44 min-
402 utes W. about 235 3/4 feet to a point which, measured along a line perpendicular to the east line of Market street, is distant easterly 150 feet from the east line of Market street; thence, along a line parallel with and distant 150 feet easterly from the east line of Market street, S. 31 degrees 20 minutes W. about 421.2 — to the north line of said ground conveyed as aforesaid to the Ashtabula, Youngstown & Pittsburgh Railroad Company, and thence along the said north line of land conveyed to said railroad company S. 59 degrees 2 minutes E. about 139.7 feet to the beginning, containing 1 acre and .28388 of an acre of land, and is the same land conveyed to said corporation by John Stambaugh, trustee, *et al.* 14th July, 1881, by a deed recorded in said records in vol. 50, at page 66 *et seq.*

The twenty-sixth parcel is the east end of outlot No. 2, in said city, contains about 3 & 2/100 of an acre of land, and is the same land conveyed to said corporation 30th July, 1881, by Edwin Bell *et al.* by a deed recorded in said records in vol 50, at page 63 *et seq.*, which deed is here referred to for a more particular description of said last-named parcel.

The twenty-seventh parcel is lot No. 576 of the latest enumeration in said city, and was conveyed to said corporation 16th November, 1881, by Mary Kelley by a deed recorded in said records in vol. 51, at page 34.

The twenty-eighth parcel is the east part of lot No. 575 of the latest enumeration in said city, and is bounded as follows: Beginning at the northwest corner of lot No. 574, on the south line of the Pennsylvania and Ohio canal, thence in a westerly course, parallel with the south line of said lot No. 575, 25 feet; thence south, parallel
403 with the west line of lot No. 574, to the north line of lot No. 573; thence east along the north line of said lot No. 573 25 feet to the southwest corner of lot No. 574, and thence north along the west line of lot No. 574 to the place of beginning, and was conveyed to said corporation 25th November, 1881, by Mary Joice *et al.* by a deed recorded in said records in vol. 51, at page 63.

The twenty-ninth parcel is the west part of lot No. 575 of the latest enumeration in said city, situated on the south side of the Pennsylvania & Ohio Canal, bounded on the north by the towing-path of said canal, on the east by the east part of said lot No. 575, which said east part was conveyed by Charles Gillen to Mary Kelley; on the south by lots 573 and 577, and on the west by lot 576, and was conveyed to said corporation 2nd December, 1881, by Michael Connors *et ux.* by a deed recorded in said records in vol. 51, at page 90.

The thirtieth parcel, situated in the city of Youngstown, county

of Mahoning, and State of Ohio, and known as being a part of city lot No. two hundred and fifty-seven (257), and is bounded as follows, to wit: Beginning at the northeast corner of Champion and Bane streets, in said city, which is also the southwest corner of said lot number 257, thence south 60 degrees east along the north line of Bane street seventy-five (75) feet to the east line of said lot number 257; thence north 30 degrees east along said line between said lots numbers 256 and 257 one hundred (100) feet; thence north 60 degrees west parallel with said north line of Bane street seventy-five feet to the east line of Champion street; thence south 30 degrees west along the east line of Champion street one hundred (100) feet
404 to the place of beginning, and being a part of the same premises conveyed by Henry Wick, Mary T. Wick, Hugh B. Wick, and Lucretia T. Wick to John Keef by a deed dated the 8th day of April, 1869, and by the said John Keef and Mary A. Keef, his wife, conveyed to Owen Evans by deed dated the 26th day of July, A. D. 1881, and by deed dated the 26th day of July, A. D. 1881, and by the said Owen Evans and Ann Evans, his wife, conveyed to Chauncey H. Andrews by deed dated the 30th day of November, A. D. 1881, and being a part of lot number twenty-six (26) of Bane & Wick's subdivision of a part of the southern division of outlots of the village of Youngstown, be the same more or less, but subject to all legal highways.

Thirty-first parcel, all of the two lots and parcels of land lying and being situate in township of Poland, county of Mahoning, and State of Ohio, the first of which said two parcels is known as being a part of great lot number twenty-one (21) of the original survey of said township, and is bounded and described as follows, to wit: Beginning at a post in the line between lands formerly owned by W. M. McCombs and lands formerly owned by Thomas Struthers north of and twenty-five (25) feet from the center of the Lawrence railroad, thence by said line N. 3.80 degrees E. twelve and twenty one-hundredths (12.20) chains to a post (now stone) corner; thence S. 89 degrees E. twenty-three and thirty one-hundredths (23.30) chains to the center of the Mahoning river; thence S. 42 degrees E. eight and eighty one-hundredths (8.80) chains; thence S. 39½ degrees W. eleven and twenty-one one-hundredths (11.21) chains; thence N. 30½ degrees W. eight and fifty-nine one-hundredths (8.59) chains; thence west nine and ninety one-hundredths (9.90) chains; thence S.
405 39½ degrees W. six and forty-four one-hundredths (6.44) chains; thence N. 50½ degrees W. two and eleven one-hundredths (2.11) chains to the place of beginning, containing twenty-nine and forty-nine one-hundredths (29.49) acres of land, more or less.

The second of said two parcels of land is known as being a part of great lot number eleven (11) of the original survey of said township, and is bounded and described as follows, to wit: Beginning at a post on the line between the above-described parcel of land and land formerly owned by W. M. McCombs and thirty-three feet north 39½ degrees east from the center line of the Lawrence railroad, thence N. ⅜ degrees east five (5) chains and nine (9) links to a post;

thence N. 84¾ degrees W. one chain and seventy-eight (78) links; thence N. 81⅞ degrees W. one (1) chain and fifty-four (54) links; thence N. 77¼ degrees W. one chain and fifty (50) links; thence N. 72⅜° W. 1 chain 50 links; thence N. 67⅜ degrees W. one (1) chain and fifty links; thence N. 62⅝ degrees W. two (2) chains and thirty (30) links; thence along the north line of the Lawrence railroad, being thirty-three (33) feet from the center line of said railroad, S. 50½ degrees E. twelve (12) chains and forty-six (46) links to the place of beginning, containing two and three one-hundredths (2.03) acres of land, more or less, and being the same land which was conveyed by W. M. McCombs and wife to Thos. Struthers and others by deed dated 13 April, 1869, and recorded in Mahoning County Records, in vol. 26, at page 727 *et seq.*

The grantors also give and grant to said grantee, its successors and assigns, all the rights and privileges that they may have or
406 own in the right of way upon which is constructed the switch railroad track connecting the above-described lands and running over a part of the same with the Pittsburgh and Lake Erie Company's main line, reserving, however, the right at any time to and for them or any of them, or their heirs and assigns, to make connection with the said switch at any place where it runs on or over their own or other adjacent lands not hereby conveyed.

Thirty-second parcel, situated in the city of Youngstown, county of Mahoning, and State of Ohio, and known as part of what is now called outlot No. 6 according to the latest numbering of lots in said city. Said lot of land was formerly known as part of outlot No. 10, in the east division of the original outlots of said city, and bounded as follows, to wit: Commencing at a point on the east side of Presque Isle street distant southerly sixteen (16) rods from a point on said east side of said street fifteen (15) feet south from what was common water-mark in the Pennsylvania & Ohio canal (which point is now marked by an iron pin located and driven by James Mackey, surveyor), thence south with the east line of Presque Isle street sixty-seven feet ten and one-half inches (67 ft. 10½ in.) to a point four feet north of the north rail of the Ashtabula, Youngstown and Pittsburgh railroad track; thence north 78 degrees east one hundreed and seventy-two and one-twelfth (172 1/12) feet to a point; thence north on a line parallel with the east line of Presque Isle street fourteen feet nine and one-half inches (14 ft. 9½ in.) to a point that is in the southeast corner of a certain lot of ground conveyed September 3rd, 1852, by Charles Grute to James H. Ford by deed recorded in Mahoning County Record of Deeds,
407 vol. 7, page 183; thence westerly on the southern boundary line of said lot conveyed by Grute to Ford a distance of ten (10) rods to the place of beginning, with all appurtenances thereunto belonging.

The above description of lands owned by Brown, Bonnell & Co. which have come into my possession and control as receiver may be more concisely described in the following way:

Description of Brown, Bonnell & Co.'s Land East of Presque Isle Street.

Parcel 1st, situated in the city of Youngstown, Mahoning county, and bounded on the north by the south line of a right of way belonging to the New York, Pennsylvania & Ohio Railroad Company as purchased from Brown, Bonnell & Co.; on the south by a right of way of the Ashtabula and Pittsburgh Railroad Co. *et al.* by low-water mark in the Mahoning river and by various city lots; on the east by the center of Crab creek, and on the west by the east line of Presque Isle street. Said lands are more particularly described as follows: Beginning at a point on the east line of Presque Isle street where the same is intersected by the north line of lands belonging to the said Ashtabula & Pittsburgh R. R. Co. as purchased by said R. R. Co. from Mason Evans Oct. 25, 1884, being N. 4½ degrees east 6¾ feet from the center line of the main track of the A. & P. R. R. Co. and S. 4½° W. 67 feet and 10½ inches from an iron stake on the east line of said Presque Isle street set for the northwest corner of
408 what is known as the brick-yard lot, recently purchased by Brown, Bonnell & Co. from said Mason Evans; thence along the north line of the A. & P. R. R. land N. seventy-eight degrees E. 172½ feet to a point S. 4½ degrees W. 14 feet 9½ inches from an iron stake at the northeast corner of said brick-yard lot and N. 4½ degrees E. 6 feet 10½ inches from the center of said A. & P. main R. R. track; thence S. 4½ degrees W. on the east line of said A. & P. R. R. Co.'s land to low-water mark on the north side of the Mahoning river; thence easterly down said river by a line or lines commencing with low-water mark to a point where the west line of city lots Nos. 583 and 584 produced would intersect said low-water mark; thence north 1 degree 57 minutes east, crossing said A. & P. R. R. and coinciding with the west line of said city lots 483 and 484, to an iron stake at the northwest corner of said lot No. 583, now owned by Wm. Scott; said iron stake is at the south side of the towing-path of the former site of the Pennsylvania and Ohio canal; thence north 76¾ degrees east 2 chains and 30 links to an iron stake at the northeast corner of said lot 583, owned by said Wm. Scott; thence S. 1 degree 57 minutes west 2 chains and 44½ links along the east line of said Scott's land to an iron stake at the northwest corner of land owned by Thomas George, being also the southwest corner of city lot 582; thence along the south line of said lot 582 eastwardly 98 links to an iron stake at its southeast corner, being one of the corners of Thomas George's lot; thence N. 1 degree 35 minutes east 13 links on the east line of lot 582 to a spike nail 1½ ft. from the
409 center of a manhole of the main sewer; thence N. 76¾ degrees E. 66½ feet to an iron stake on the west line of city lot No. 580, being the northeast corner of Thomas George's lot; thence S. 1½ degrees W. 48½ links to an iron stake at the northwest corner of city lot 579, now owned by James O'Boyle; thence S. 88¾ degrees E. one chain and 89 links to the west line of city lot 577, now owned by Stephen Kennedy, being also the northeast corner of city lot 578, now owned by Patrick Kaden; thence N. 1¾ degrees east 42 links

to an iron stake at the northwest corner of said Kennedy's lot; thence S. 88⅞ degrees east 2 chains and 87½ links to an iron stake at the northeast corner of city lot 573, now owned by the heirs of Edward McElroy; thence in a southerly direction along the east line of said McElroy's lot No. 573 to low-water mark at the north side of the Mahoning river; thence down said river coinciding with low-water mark to the southwest corner of lot 570, now owned by John Lalley; thence north 1 degree 26 minutes east to an iron stake at the northwest corner of said Lalley's lot; said stake is also at the south line of said towing-path of said P. & O. canal; thence along the south line of said towing-path S. 68 degrees 31 minutes one chain and 60 links to an iron stake 5 7/12 feet easterly from the northeast corner of said Lalley's dwelling-house; thence along the south line of said towing-path S. 62 degrees and one minute E. one chain and 56 links to an iron stake; thence along the course of the south line of the said towing-path S. 55 degrees 46 minutes E. one chain and 65 links to an iron stake in the middle of Crab creek; thence in a northeasterly direction by a line running up the center of said creek to its intersection
410 with the south line of the right of way belonging to the New York, Pennsylvania & Ohio R. R. Co., said point of intersection being 8 feet by rectangular measurement from the center line of the track of said railroad; thence in a westerly direction along the south line of said N. Y., P. & O. R. R. land—keeping everywhere 8 feet distant from the center line of its track—to the point of its intersection with the east line of said Presque Isle street; thence along the east line of said street to the place of beginning, and containing approximately 9.295 acres, be the same more or less, excepting herefrom whatever rights of way Brown, Bonnell & Co. may have heretofore granted over the lands herein described to the Liberty & Vienna R. R. Co., or to its successors, the Ashtabula, Youngstown & Pittsburgh R. R. Co.; also the right of way of the Liberty & Vienna R. R. Co. as obtained by appropriation through city lot 572, purchased by Brown, Bonnell & Co. from Bryen & Ann Kennedy subsequent to said appropriation.

Description of Lands Belonging to Brown, Bonnell & Co. West of Presque Isle Street.

Parcel 2nd, situated in the city of Youngstown and west of parcel first herein described, and bounded as follows: Beginning on the south line of the right of way belonging to the New York, Pennsylvania & Ohio Railroad Co., as purchased as aforesaid from Brown, Bonnell & Co., where said line intersects the east line of original lot No. 31 of what is known as Bane & Wick's Addition to the village of Youngstown, executed December 18th, 1848, and duly recorded—said point of intersection is on the course of said east line of
411 lot No. 31 about 17⅔ feet southerly from an iron stake on the north side of the track of said N. Y. & P. & O. R. R. Co. and by rectangular measurement it is eight feet from the center line of said track—thence southerly along the east line of said lot No. 31 to the

north line of the right of way and lands formerly occupied by the Pennsylvania & Ohio Canal Company; thence easterly along said north line of said right of way and lands last mentioned to a point at or near the southeast corner of the building (now standing) which was formerly known as the Pearl Flouring Mill; thence in a rectangular course across said canal to the north line of land purchased from John Stambaugh *et al.* by Brown, Bonnell & Company by deed dated July 14th, 1881, and recorded in Mahoning County Records, vol. 50, page 66; thence along the north line of said land as purchased from said Stambaugh *et al.* to the northwest corner thereof, being a point 15 feet southerly from what was formerly high-water line at the south side of said canal; said point is also described in said deed as N. 49 degrees 44 minutes west, about 135¾ feet from a stone monument standing fifteen feet southerly from said high-water line in said canal; thence south 31 degrees 20 minutes west about $421\frac{2}{10}$ feet (by a line parallel with and distant by rectangular measurement 150 feet southeasterly from the east line of Market street) to the north line of land belonging to the Ashtabula and Pittsburgh R. R. Company; thence along the north line of the said A. & P. R. R. Co. south 59 degrees 2 minutes east about $139\frac{7}{10}$ feet to the middle of a stone monument at the northeast corner of said A. & P. R. R. Co.'s land; thence along the east line of said A. & P. R. R. Co.'s land south 30 degrees 28 minutes
412 west about $277\frac{8}{10}$ feet to low-water mark at the north side of the Mahoning river; thence along said low-water mark south 63 degrees 55 minutes east 12½ feet; thence along said low-water mark south 80 degrees 25 minutes east about $142\frac{6}{10}$ feet to the southwest corner of land belonging to Arms, Bell & Co.; thence along the west line of Arms, Bell & Co.'s land north 30 degrees 35 minutes east about 290 feet to an iron pin near the northeast corner of the south part of Arms, Bell & Co.'s office; thence along the north line of said Arms, Bell & Co.'s land south 59 degrees 25 minutes east about $229\frac{1}{10}$ feet to an iron pin at the northeast corner thereof; thence along the east side of said Arms, Bell & Co.'s land south 30 degrees 35 minutes west 218 feet to low-water mark at the north side of the Mahoning river; thence down said river coinciding with low-water mark to the intersection of the line of low-water mark with the west line of Presque Isle street; thence along the west line of Presque Isle street north 4½ degrees east to the south line of the right of way of the said N. Y., P. & O. R. R. Co., the point of intersection being eight feet southerly by rectangular measurement from the center of said R. R. Co.'s track; thence westerly along the south line of said R. R. Co.'s land parallel with and everywhere eight feet distant from the center line of said track to the place of beginning, and containing approximately $22\frac{61}{100}$ acres, be the same more or less, excepting herefrom whatever rights of way Brown, Bonnell & Company may have heretofore granted over the lands herein described to the Liberty and Vienna Railroad Co. or to its successor, the Ashtabula, Youngstown & Pittsburgh Railroad Co.; also excepting and reserving herefrom to Arms, Bell & Co. and to
413 the Liberty and Vienna R. R. Co. and to their successors and assigns such rights to a right of way across the land

conveyed by Arms, Bell & Co. to Brown, Bonnell & Company as was granted in a contract made between Arms, Bell & Co. and said Liberty and Vienna R. R. Co. November 10th, 1870; also excepting such reservations relative to rights of way and to the removal of Arms, Bell & Co.'s office building from the lands herein described as are contained in a deed from said Arms, Bell & Co. to Brown, Bonnell & Co., dated July 30, 1881, and recorded in vol. 50, on page 63, &c., in Mahoning County Records.

The Brown, Bonnell & Co. office lot I intended to designate as parcel No. 3 and give the same description as given in the deed of C. A. Andrews to the company, but as the Andrews deed is in the hands of Mr. Swing I leave it to him to add that part of the description of the Brown, Bonnell & Co.'s property in the city of Youngstown, when the boundaries describing all their property in the city will be complete.

Youngstown, Ohio, Nov. 13, 1885.

JAMES MACKEY.

SCHEDULE B.

For convenience of description the property connected with the real estate which, with such real estate, forms the plant is described in two divisions, marked respectively A and B.

SCHEDULE B.

Division A.

No. 1 puddle mill.

No 1 puddle mill contains as follows: 18 single puddling furnaces, 5 double puddling furnaces, 3 heating furnaces, nail
414 mill; 13 of these furnaces have upright boilers for steam purposes, with boshes, tools, scales, duplicate machinery, race plates, and all necessary details for puddling iron, etc., having one train of muck rolls 18 inches diameter, burden-squeezer, &c., &c.; one large engine 22 x 72, fly-wheel, gearing, &c.; also one train of 18-in. rolls for rolling nail plate, with muck, scrap, and nail shears; also one blast engine 10 x 14, one shear engine 6 x 12, one engine for nail factory 14 x 28; also nail factory, having 50 nail machines, heating furnaces for same, nail plate and nail boxes, scales for weighing, shaftings, belts, &c.. &c., for carrying on the business of nail-cutting; also one set of scrap shears, railroad trestling and tracks for the supply of material to all parts, and all in good running order; also one battery of 4 double-flue boilers in connection with nail factory, nearly new and in good order; trestles, railroad tracks, and cars to supply wants in good order. * * *

No. 2 puddle mill.

No. 2 puddle mill contains as follows: 9 single puddling furnaces,
7 double puddling furnaces, 6 heating furnaces, and 2 annealing

furnaces, 2 overhead double-flue boilers, 8 engines, fly-wheels, shafts, gearings, &c., all complete; one engine 10 x 18, one engine 30 x 60, 2 engines 15 x 24, one engine 10 x 12, two engines 7 x 15, one engine 12 x 24, one engine 10 x 18; also one force-pump for boilers, one sheet train 24 in. diam., one muck train 24 in., one bar train 18 in., one 10-in. train, one 8-in. train, with duplicate rolls for roughing,
415 and a very large collection suited to the various trains of finishing rolls of ordinary and a large number of special rolls, with race plates, standing plates, boshes, tools, straightening plates, cooling beds, shears, shaftings, pulleys, belts, three roll lathes, tools, boxes, stands, &c., &c., all complete and all in good working order, with railroad trestles and tracks, with cars to supply such material as is needed for full capacity, all in good working order.

No. 3 puddle mill.

No. 3 puddle mill contains as follows: 10 double puddling furnaces and 3 heating furnaces, 1 20-in. muck train, duplicate rolls, 1 20-in. bar train, duplicate roughing rolls, 6 engines, 1 force-pump, 1 cold-water pump and blower, shears, punches, press, lathe, scales, race and standing plates, boshes, tools, burden-squeezer, cooling beds, water tanks, heater, and ten boilers, double-flue over puddling furnaces, and all in complete order, with R. R. tracks in connection with all parts; one engine 28 x 60, one engine 10 x 20, one engine 10 x 12; also a very large assortment of rolls, rounds, and squares, flats, angles, and special shapes, one steam-driven swing saw, shafts, pulleys, belts, &c., &c., in complete good running order; also one engine 8 x 12 for punch, and one for muck shears, &c., 6 x 12; one Berryman heater, steam and water pipes, all in working order.

No. 4 puddle mill.

No. 4 puddle mill contains as follows: 18 double puddling furnaces, 18 double-flue boilers over same, 1 engine 24 x 48, 1 small engine 10 x 16, 1 small engine 12 x 24, 1 large force-pump,
416 one large blower, 1 muck train, 22-in. duplicate rolls, 1 slitting machine, duplicate slitters, 1 extra large burden-squeezer, fly-wheel, shafts, gearing, heater, water tank, R. R. tracks, metal sheds, scales, steam connections, new and substantial building, covered with galvanized corrugated iron, solid cut-stone foundations, elevated iron bed-plates, all in good and complete order, with tools, buggies, &c., &c.

Sundry mills and factories.

Near southwest end of No. 2 mill is link and pin factory, containing two heating furnaces, engine 8 x 16, one blower, a complete set of dies for links and pins, R. R. tracks, &c., &c., in complete working order, "hammers being leased on royalty."

Near to the above is the spike factory, containing five spike machines and two washer machines, one pair of shears, 8 heating furnaces, grindstone, one engine 12 x 24, fly-wheel, shaft, pulleys, belts, tools, dies, tumbler, scales, R. R. tracks, &c., &c., all in good and

complete order, having an iron building, galvanized roof, all nearly new.

Rail shear building, near by, contains a powerful set of shears for cutting rails and large sections, with engine 10 x 12, fly-wheel, shaft, pulleys, belts, &c., &c., all in good working order; R. R. tracks in connection, all in good order.

Adjoining this is 12-in. mill, containing one engine 24 x 48, fly-wheel, shaft, gearing, 1 12-in. roll train, two heating furnaces, two cooling beds, one link-bending machine, two shears, one blower, 3 engines, one 8 x 12, one 8 x 12, one 9 x 20, race, standing plates, boshes, tools, a large assortment of rolls, rounds, squares, flats, and special shapes, all in complete running order, having places
417 for pinion roughing rolls, strands, flats, ovals, and rounds in line with train, duplicate roughing, oval, and round rolls.

Adjoining this mill is hoop and ten-inch mills, containing one engine 18 x 48, one engine 10 x 12, one 7 x 14, and one 10 x 12; five sets of shears (including muck shears) adjoining; also three heating furnaces, two trains of rolls, 8 in. and 10 in., band wheels, shafts, belts, pulleys, a full set of rolls, rounds, squares, flats, shapes, and several sets duplicate rolls, all in good order, having race, standing and straightening plates, cooling beds, &c., &c., with R. R. tracks in connection, all in good working order.

Boiler and crimping room.

Containing two batteries of double flue boilers, two force-pumps, crimping machines, paning bosh, drying-room, heater, &c., all in good order.

Foundry.

Large frame building, nearly new, covered with galvanized corrugated roofing, and containing cupola, drying oven, core-room, small pattern-room, Marshall's elevator, flasks (iron and wood), roll pit, sweep bars, chill moulds, a large variety of small patterns, covers, &c., &c., all in good order.

Machine shop.

A large brick building containing the following machinery: Two large planers, three large lathes, one shaper, two large drill-presses, one small lathe, one pipe and bolt cutter, one hydraulic press, one large crane, one engine 15 x 36, band wheel, shafts, pulleys,
418 belts, tools, a large amount of unfinished work, one engine 12 x 24 (Buckeye make), one 10 x 14, and fall set of machine tools, dies, drills, bars, &c., &c., all in very complete order.

Electric light and testing room.

In an intermediate room is an "Olsen" testing machine of 200,000 lbs. capacity, with tools, lights, desks, tables, &c., with belts, pulleys, &c., complete.

Close by is electric light room, having two Brush dynamos, 16 lights each; two Westinghouse double cylinder engines — x 10, with

belts, pulleys, &c., and having connections with electric lamps in various parts of mills and furnaces.

Blacksmith shop.

Blacksmith shop contains 8 blacksmith fires, steam-hammer, tilt-hammer, one set of shears, bolt-cutter, anvils, vices, tools, cupboards, tongs, shafting, belts, pulleys, blower, assorted iron and steel tuyeres and pipes, &c., &c., all in good order; adjoining this, tumbling box, grindstone, Marshall's elevator to pattern-room, shafting, pulleys, belts, &c., &c. Over this and machine shop is pattern shop and room, containing jig-saws, circular saw, wood-turning lathe, lumber, drawings, and patterns of great variety, being almost a complete set to all parts of the mills and furnaces.

Sundry buildings.

Sand-grind building contains one engine 10 x 14, one Forester's crusher, one pulverizer pan and frame, pulleys, belts, &c., &c., with all necessary connections thereto with building, &c., &c., complete.

419 Ore grinder.

Two buildings, containing two engines, two Blake crushers, two pulverizing pans, with shafts, belts, pulleys, &c., &c., all complete, engines being 12 x 24, R. R. tracks, and iron-ore cars, all in good order.

Locomotive-engine houses.

One large locomotive-house and 36-ton locomotive (J. V. Ayer), with smoke-stacks, stoves, water connections, ash-pit, all complete; engine in good order and railroad track connected. Small locomotive-engine house is adjoining lower warehouse, having smoke-stacks, ash-pit, stoves, and connected with R. R. tracks to mill yard, having two 7½-ton and one 10-ton locomotives for yard use, all in good order.

Warehouses and scales.

One large shipping warehouse, with various R. R. tracks connecting, having offices, desks, two ten-ton Fairbanks' and several small scales, with turn-tables, main-line track, platforms, &c.; nail-house, stone-rooms, gas connection, &c., &c., communicating by track to mill scales and lower warehouse scales, each ten-ton capacity; house of two rooms for offices, desks, benches, testing blocks, &c. In mill yard is also weighing office and store-room, having two sets of scales of 15 and 10 tons each, respectively, all in good order. Office-room contains clock, time block, desk, &c., &c. Store-room contains sundry items for use of plant—new and old tools, &c., &c.

Tubular boilers.

420 Back of Phœnix furnace is a battery of 4 boilers, with 40 4½-in. flues, iron frame, and covering, containing heater and steam force-pump and connected with pipes by a general arrangement with all parts of finishing mills and puddle mills.

The lower warehouse is connected by general railroad track and contains store-room, scale-room, &c.; one scale of ten-ton capacity, Fairbanks' make, all in complete order.

Water works.

The water works adjoining Presque Isle street contains one large Blake pump and one Worthington duplex, connected with pipes to river and to all parts mills and furnaces, having fire-plugs, valves, and outlets to cisterns, boshes, furnaces, and also connected by supply and discharge pipes to two enormous wooden tanks, all in good order and complete.

Phœnix furnace.

Phœnix furnace is 66 feet high, 15 feet in bosh, having iron-roof casting-house, brick engine-houses, two blowing engines—one 54 x 84 and one 48 x 60—two force-pumps, two hot blasts, three sets of boilers, double flue, two boilers in a set; iron crane hoist, one large building for storing ore, one for limestone, one for coke, small office for furnace superintendent, and all connected by trestles and R. R. tracks and all in good running order; also a blacksmith shop, with anvil, tools, vice, &c., &c., for use of furnace.

Falcon furnace.

Below Presque Isle St. is Falcon furnace, 60 feet high, 13 feet bosh, with brick casting-house, brick engine-house, ore and coke
421 house, one engine 48 x 84 and one 18 x 48 (blowing engine), one hot blast; also two cold-water and two steam force-pumps, two batteries of two boilers each, double flued, and three batteries of four cylinder boilers, one Blake crusher and one engine 10 x 12, and one crane hoist (iron) to furnace, one blacksmith shop, with tools, etc., complete, all having trestle and R. R. tracks in connection thereto and all in good order (just relined).

Boiler shop.

Connected with buildings of No. 2 mill is the boiler shop, containing punch, rolls, flue-expander, blacksmith fire, patterns, tools, formers, &c., &c., all complete and in good order.

Struthers furnace.

Struther or "Anna" furnace has a stack 75 feet high, 16 feet bosh, iron hoist (Otis), buildings for storing ore, limestone, coke, &c., having trestle and R. R. track, two hot blasts, one large brick casting-house, stables, blacksmith shop, engine-house, office, scales, a large amount of railroad track, two blowing engines 48 x 72, two cold-water pumps, two steam force-pumps, 4 batteries of boilers, two boilers in each battery; one ten-ton wagon scale, one track scale, 30 tons; about thirty acres of ground, with right to deposit cinder on lands of Thomas Struthers recorded; also iron cinder cars and duplicate bell and hopper, &c., &c., all in reasonable repair.

Railroad tracks in and about the mill comprise (jointly narrow and standard gauge) about five miles, consisting of main line, with a weigh-house and one set of 60-ton Howe scales; R. R.
422 tracks are in good order and are laid largely of steel rails and are all in good condition and repair; also an old flour mill, now used as a keg factory; old office, used as a store-room; old pump-house and pumps back of spike factory.

Office building.

One two-story brick building 43 x 60 (with basement) for business office, with vaults, desks, books, stationery, &c.

Brown, Bonnell & Co. plant consists of the following:

About thirty-four acres of land in Youngstown; No. 1 puddle and nail mill and factory; No. 2 puddle, bar, sheet, 8-in. and 10-in.; No. 3 puddle and bar mill; No. 4 puddle, link and pin factory, spike and washer factory, 12-in. mill and link-bender, hoop and new 10-in. mills, foundry, machine shop, blacksmith shop, pattern shop, boiler shop, electric light testing room, water works, brick works, ore-grinding and sand-grinding shops, carpenter shop, &c., &c.; Phœnix, Falcon, and Anna blast-furnaces, railroads and locomotives, warehouses, scale-houses, old flour mill, brick sheds, &c., &c.; 87 boilers, 41 engines, large and small; 107 puddling furnaces, 23 heating furnaces (including spike and link), 9 pumps, cold water; 14 pumps, hot water; 7 track scales, 1 office, principal; 5 auxilary offices (warehouse, store, mill scales, time, and track), duplicate rolls, castings, lumber, cars, &c., &c., &c.

SCHEDULE "B."

Division "B."

423 1. Eight hundred shares of stock in the Mahoning Coal Company.

2. A two-thirds interest in the partnership known as Erskin & Co.

3. Leases of coal lands in Butler county, Pennsylvania, standing in the name of Ralph Wick, trustee, copies of which are hereto attached.

4. The right to remove sand and gravel from a certain tract of land described as follows: A tract or lot of land situated in Coitsville township, in the county of Mahoning and State of Ohio, being part of great lot No. 8, in the original survey of said township, and bounded as follows: On the north by the center line of the McGuffy road; on the east by lands owned on the 8th of May, 1863, by John Brownlee; on the south by lands owned at the same date by said Brownlee, Aaron C. Sears, and Isaac Kimmel; on the west by lands owned at the same date by David Pothous, being the farm upon which said Alfred C. Sears formerly resided, containing thirty-eight and eight one-hundredths acres, being the same land con-

veyed to Catharine Huist by Brown, Bonnell & Co. January 20th, 1865, and recorded in Book 21, pages 265 and 266, of Mahoning County Records of Deeds.

424 *Coal Contract.*

Articles of agreement made and entered into this 15th day of Nov., A. D. 1882, by and between William Christy, of Clay township, Butler county, Pennsylvania, party of the first part, and Ralph J. Wick, trustee, of Youngstown, Ohio, party of the second part, witnesseth: That in consideration of one dollar received and of the covenants and agreements of the second party, to be performed as hereinafter stipulated, the said party of the first part does hereby bargain, sell, and convey unto the said second party all the mineral-stone coal that may underlie the following-described tract or lot of land situate in the township of Clay, county of Butler and the State of Pennsylvania, and is bounded and described as follows:

On the north by lands of Walter Currie and John M. & Sarah Jane Chambers, on the east by lands of Walter Currie, on the south by lands of Thomas Wilson and Herron heirs, and on the west by lands of Alexander Black, containing about ninety acres; and also grants the exclusive right to test, open, mine, and remove said coal, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining and removing of said coal.

And it is agreed by the party of the second part that they will, within forty days from the date of this contract, test said land or otherwise; and in case there should be discovered a minable vein or basin of stone coal of sufficient quantity and quality to justify the opening and mining of said coal in the opinion of said second party, then they agree to mine out said coal and pay the following rate per ton for all coal mined on said premises, to wit: Ten
425 (10) cents for each 2,240 pounds of coal over 1½ screen, payments to be made and continued in the following manner, to wit: To make—semi-annually for all the coal mined from said land—that is to say, a settlement be had on the first of January and July of each year, as nearly as practicable, and payment to be made in full for all rent and royalty due up to each date, respectively, and after one year from date of this contract said second party agrees to mine out and remove annually one thousand tons of 2,240 pounds to the ton or pay for that amount as if mined.

It is further agreed by the parties to this agreement that all money paid or advanced by said second party agreeably to the above stipulations and previous to mining said coal is and shall be so considered as advanced rents prepaid on said coal and is to be deducted from the rents of the first excess of coal mined on said premises.

It is also agreed that the coal mined on said premises is to be accurately weighed and the weight to be kept in a book, which shall at all reasonable times be open for inspection of the said first party; and it is further agreed that the said party of the second part is to have the privilege of using said railroads, underground

entries, buildings, and fixtures for the purpose of mining and removing coal from other lands, and after the said mine becomes exhausted or unminable they may continue the use of said railroads, underground entries, buildings, and fixtures by paying to the party of the first part the sum of twenty — per year as long as they use them for transporting coal.

It is further agreed that said party of the second part
426 shall have the right to abandon this contract at any time they shall determine that said coal is in quantity, quality, or condition no longer minable with economy and profit and remove their machinery and other structures and property from said land.

It is hereby agreed by the party of the second part that said first party is to have coal for one dwelling-house free at the mouth of the pit in consideration for the slack and nut coal that may pass through said screen.

This lease is given subject to the Bard & Blair leases. The parties of the second part agree that the coal under the dwelling-house, barn, and any permanent building on said land shall not be removed without the consent of said first party; and we, the parties, by the signing and sealing of this contract, bind ourselves, our heirs, our assignees, and legal representatives to strictly adhere to the several covenants and agreements of this contract, as witness our hands and seals the day and year above written.

(Signed) WILLIAM CHRISTY,
RALPH J. WICK,
(Signed) By F. C. VAN DUSEN.

Signed, sealed, and delivered in presence of—
—— WALKER.
GEO. MILLER.

STATE OF PENNSYLVANIA,
County of Butler, Township of Cherry:

On this 15th day of Feb., A. D. 1883, before me, an acting justice of the peace — and for said county, personally came William Christy, the above named, who acknowledged the signing, sealing, and execution of the foregoing instrument to be his free, voluntary
427 act and deed for the uses and purposes therein mentioned; that he is still satisfied therewith, and desires that the same may be recorded as such.

JOHN SMITH, JR.

Endorsed: Filed May 8th, 1883.

Copy.

Coal Contract.

Articles of agreement made and entered into this 17th day of November, A. D. 1882, by and between Alexander Black, of Slippery Rock township, Butler county, Pa., party of the first part, and Ralph

J. Wick, of Youngstown, O., as trustee, party of the second part, witnesseth: That in consideration of one dollar received and of the covenants and agreements of the second party, to be performed as hereinafter stipulated, the said party of the first part does hereby bargain, sell, and convey unto the said second party all the mineral-stone coal — iron ore that may underlie the following-described tract or lot of land situate in the township of Clay, county of Butler and State of Pennsylvania, and is bounded and described as follows:

On the north by the lands of Sarah Jane Chambers, on the east by lands of Wm. Christie, on the south by lands of Thomas Wilson, and on the west by lands of Samuel Black, containing twenty acres, strict measure.

And also grants the exclusive right to test, open, mine, and remove said coal, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining and removing of said coal; and it is agreed by the party of the second part that they
428 will within forty days from the date of this contract test said land by drilling or otherwise; and in case there should be discovered a minable vein or basin of stone coal of sufficient quantity and quality to justify the opening and mining of said coal in the opinion of said second party, then they agree to mine out said coal and pay the following rate per ton for all coal mined on said premises, to wit: Ten (10) cents for each of 2,240 pounds of coal run over $1\frac{1}{2}$ screen; ten (10) cents for each of 2,240 pounds of coal; payments to be made and continued in the following manner, to wit: To make payment semi-annually for all the coal mined from said land—that is to say, a settlement be had on the first of Jan. and July of each year, as nearly as practicable, and payment to be made in full for all rent and royalty due up to each date, respectively, and after one year from the date of this contract said second party agrees to mine out and remove annually one thousand tons of 2,240 pounds to the ton or pay for that amount as if mined.

It is further agreed by the parties to this agreement that all money paid or advanced by said second party agreeably to the above stipulations and previous to mining said coal is and shall be so considered as advanced rents prepaid on said coal and is to be deducted from the rents of the first excess of coal mined on said premises.

It is also agreed that all coal mined on said premises is to be accurately weighed and the weight to be kept in a book which shall at all reasonable times be open for inspection of the said first
429 party, and it is further agreed that the said party of the second part is to have the privilege of using the said railroads, underground entries, buildings, and fixtures for the purpose of mining and removing coal from other lands, and after the said mine becomes exhausted or unminable they may continue the use of said railroads, underground entries, buildings, and fixtures by paying to the party of the first part the sum of one hundred dollars per year as long as they use them for transporting coal.

It is further agreed that said party of the second part shall have the right to abandon this contract at any time they shall determine

that said coal is in quantity, quality, or condition no longer minable with economy and profit, and remove their machinery and other structures and property from said land by paying all rents or royalty due on said lease; and it is further agreed that no royalty is to be paid for nut and slack coal; also that the party of the first part is to have coal for one dwelling-house free of charge at the mouth of the pit during the continuance of this lease; also that this lease is given subject to the Bard lease on said described land; also that if the second party fails to comply with the agreements herein contained, then in that case this lease shall be null and void.

And we, the parties, by signing and sealing of this contract, bind ourselves, our heirs, our assignees, and legal representatives to strictly adhere to the several covenants and agreements of this contract, as witness our hands and seals the day and year above written.

430 ALEXANDER BLACK.
(Signed) RALPH J. WICK, *Trustee*, [SEAL.]
By F. C. VAN DUSEN.

Signed, sealed, and delivered in presence of—
JOHN SMITH.

STATE OF PENNSYLVANIA,
County of Butler, Township of Slippery Rock:

On this 28th day of Nov., A. D. 1882, before me, an acting justice of the peace in and for said county, personally came Alexander Black, above named, who acknowledged the signing, sealing, and execution of the foregoing instrument to be his free, voluntary act and deed for the uses and purposes therein mentioned; that he is still satisfied and desires that the same may be recorded as such.

JOHN SMITH, *J. P.*

Endorsed: Filed May 8th, 1883.

Copy.

Coal Contract.

Articles of agreement made and entered into this 13th day of Dec., A. D. 1882, by and between John M. Chambers and Sarah Jane Chambers, of Clay township, Butler county, Pennsylvania, party of the first part, and Ralph J. Wick, trustee, of Youngstown, Ohio, party of the second part, witnesseth:

That in consideration of one dollar received and for the covenants and agreements of the second party, to be performed as hereinafter stipulated, the said party of the first part does hereby bargain, sell, and convey unto the said second party all the mineral- stone coal that may underlie the following-described tract or lot of land situate in the township of Clay, county of Butler and State of Pennsylvania, and is bounded and described as follows: On the north by lands of M. M. Stevenson, on the south by lands of Wm. Christy and Alexander Black, on the east by lands of Walter Currie, on

the west by lands of John Smith, known as the Hindman
431 farm, containing thirty (30) acres, more or less.

And also grants the exclusive right to test, open, mine, and remove said coal, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining and removing of said coal.

And it is agreed by the party of the second part that they will within forty days from the date of this contract test said land by drilling or otherwise; and in case there should be discovered a minable vein or basin of stone coal of sufficient quantity and quality to justify the opening and mining of said coal in the opinion of said second party, then they agree to mine out said coal and pay the following rate per ton for all coal mined on said premises, to wit: Ten (10) cents for each ton of 2,240 pounds of coal over 1½ screen; payments to be made and continued in the following manner, to wit: To make payment semi-annually for all the coal mined from said land—that is to say, a settlement be had on the first of Jan. and July of each year, as nearly as practicable, and payment to be made in full for all rent and royalty due up to each date, respectively; and after one year from the date of this contract said second party agrees to mine out and remove annually two thousand tons, of 2,240 pounds to the ton, or pay for that amount as if mined.

It is further agreed by the parties to this agreement that all the money paid or advanced by said second party agreeably to the above stipulations and previous to mining said coal is and shall be so considered as advanced rents prepaid on said coal and is
432 to be deducted from the rents of the excess of coal mined on said premises.

It is also agreed that the coal mined on said premises is to be accurately weighed and the weight to be kept in a book, which shall at all reasonable times be open for inspection of the said first party; and it is further agreed that the said party of the second part is to have the privilege of using said railroads, underground entries, buildings, and fixtures for the purpose of mining and removing coal from other lands, and after said mine becomes exhausted or unminable they may continue the use of said railroads, underground entries, buildings, and fixtures by paying to the party of the first part the sum of thirty dollars per year as long as they use them for transporting coal.

It is further agreed that said party of the second part shall have the right to abandon this contract at any time they shall determine that said coal is in quantity and quality or condition no longer minable with economy and profit and remove their machinery and other structures and property from said land. It is agreed by the party of the second part to pay to the party of the first part the first year's advance royalty in the following manner: One hundred dollars at the time of the acceptance of this lease and one hundred dollars in one year from that date. It is also agreed by the party of the second part to furnish coal for the use of one dwelling-house free at the mouth of the pit in consideration for what slack and nut coal may pass through the aforesaid screen. This lease is taken subject

to the Bard and Blair leases. The party of the first part re-
433 serves a thin or surface vein of coal on the high ground which is above the spring near his and her house that they suppose their spring water comes off of; and we, the parties, by the signing and sealing of this contract, bind ourselves, our heirs, our assignees, and legal representatives to strictly adhere to the several covenants and agreements of this contract, as witness our hands and seals the day and year above written.

JOHN M. CHAMBERS. [SEAL.]
SARAH J. CHAMBERS. [SEAL.]
RALPH J. WICK, *Trustee.* [SEAL.]

Signed, sealed, and delivered in presence of—
ALBERT MECKLING.
—— WALKER.

STATE OF PENNSYLVANIA, *County of Clay, Township of Butler:*

Properly acknowledged before—
ALBERT MECHLING, *J. P.*

Endorsed: Filed May 8th, 1883.

Copy.

Coal Contract.

Articles of agreement made and entered into this 8th day of Jan., A. D. 1883, by and between J. Kelly, of Clay township, Butler county, Pennsylvania, party of the first part, and Ralph J. Wick, trustee, of Youngstown, Ohio, party of the second part, witness:

That in consideration of one dollar received and of the covenants and agreements of the second party, to be performed as hereinafter stipulated, the said party of the first part does bargain, sell, and convey unto said second party all the mineral-stone coal that may underlie the following-described tract or lot of land situate in the township of Clay, county of Butler and State of Pennsylvania, and is bound and described as follows: On the north by lands of Thomas Wilson, on the east by lands of Samuel Stevenson, on the south by lands of A. H. Carrothers, containing about sixty-five acres of land, more or less.

434 And also grants the exclusive right to test, open, mine, and remove said coal, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining and removing of said coal.

And it is agreed by the party of the second part that they will, within thirty days from the date of this contract, test said land by drilling or otherwise; and in case there should be discovered a minable vein or basin of stone coal of sufficient quantity and quality to justify the opening and mining of said coal, in the opinion of said second party, then they agree to mine out said coal and pay the following rate per ton for all coal mined on said premises, to wit: Ten (10) cents for each of 2,240 pounds of coal over 1½

screen, payments to be made and continued in the following manner, to wit: To make payment semi-annually for all the coal mined from said land—that is to say, a settlement be had on the first of Jan. and July of each year, as nearly as practicable, and payment to be made in full for all rent and royalty due up to each date, respectively, and after one year from the date of this contract said second party agrees to mine out and remove annually six hundred and fifty tons of 2,240 pounds to the ton or pay for that amount as if mined.

It is further agreed by the parties to this agreement that all money paid or advanced by said second party agreeably to the above stipulations and previous to mining said coal is and shall be so considered as advanced rents prepaid on said coal and is to be deducted from the rents of the first excess of coal mined on said premises. It is
435 also agreed that all coal mined on said premises is to be accurately weighed and the weight to be kept in a book, which shall at all reasonable times be open for inspection of the said first party, and it is further agreed that the said party of the second part is to have the privilege of using said railroads, underground entries, buildings, and fixtures for the purposes of mining and removing coal from other lands, and after the said mine becomes exhaustable or unminable they may continue the use of said railroads and underground entries, buildings, and fixtures by pay- the party of the first part the sum of fifteen dollars per year as long as they use them for transporting coal.

It is further agreed that said party of the second part shall have the right to abandon this contract at any time they shall determine that said coal is in quantity, quality, or condition no longer minable with economy and profit, and remove their machinery and other structures and property from said land.

It is hereby agreed by the party of the second part to give to the party of the first part, at the mouth of the pit, what coal he may need for one dwelling-house free during the continuance of this lease in consideration for the slack and nut coal that may pass through the aforesaid screen. It is understood that the lease is given subject to the Bard & Blair leases. It is also understood that the coal under the permanent buildings on said farm shall not be removed without the consent of the first party hereto, and finally it is agreed that if the second party hereto fails to comply with the agreements herein this lease shall be null and void.

And we, the parties, by the signing and sealing of this contract, bind ourselves, our heirs, our assignees, and legal representatives to strictly adhere to the several covenants and agreements of this con-
436 tract, as witness our hands and seals the day and year above written.

JAMES KELLY. [SEAL.]
RALPH J. WICK,
By F. C. VAN DUSEN. [SEAL.]

Signed, sealed, and delivered in presence of—
J. E. KELLY,
F. C. VAN DUSEN.

STATE OF PENNSYLVANIA, *County of Butler, Township of Clay:*

On this 15th day of Feb., A. D. 1883, before me, an acting justice of the peace — and for said county, personally came James Kelly, the above named, who acknowledged the signing, sealing, and execution the foregoing instrument to be his free, voluntary act and deed for the uses and purposes therein mentioned; that he is still satisfied therewith, and desires that the same may be recorded as such.

JOHN SMITH, *J. P.*

Endorsed: Filed May 8th, 1883.

Copy of Coal Contract.

Articles of agreement made and entered into this fifteenth (15) day of Jan., 1883, by and between Walter Currie, of Cherry township, Butler county, Pennsylvania, party of the first part, and Ralph J. Wick, trustee, of Youngstown, Ohio, party of the second part, witnesseth:

That in consideration of one dollar received and of the covenants and agreements of the second party, to be performed as hereinafter stipulated, the said party of the first part does hereby lease unto the said second party for the period of fifty years from the date hereof all the mineral-stone coal and iron ore that may underlie the following-described tract or lot of land situate in the township of Cherry, county of Butler and State of Pennsylvania, and is bounded and described as follows: North by lands of Elizabeth Christie, east by lands of Jacob Walford, south by lands of Herron
437 heirs and William Christie, and west by lands of John M. Chambers and M. M. Stevenson, containing one hundred and eighty-seven acres, more or less.

And also grants the exclusive right to test, open, mine, and remove said minerals, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining and removing of said coal and iron ore; and it is agreed by the party of the second part that they will, within forty (40) days from the date of this contract, test said land by drilling or otherwise; and in case there should be discovered a minable vein or basin of any of said minerals of sufficient quantity and quality to justify the opening and mining of either of them in the opinion of said second party, then they agree to mine out the same and pay the following rate for all said coal and iron ore mined on said premises, to wit: Ten (10) cents for each of 2,240 pounds of coal run over a 1½-in screen; ten (10) cents for each 2,240 pounds of iron ore; payments to be made and continued in the following manner, to wit: To make payment semi-annually for all the coal and iron ore mined from said land—that is to say, a settlement be had on the first of Jan. and July of each year, as nearly as practicable, and payment to be made in full for all rent and royalty due up to each date, respectively, and after one year from the date of this contract said second party agrees to mine out and remove annually some of said minerals equal to a royalty of two hundred dollars or pay for that

amount as if mined, except in case of war, riots, or internal commotion uncontrollable by law, by which the working of the
438 mines is prevented; in such event no advance rent or royalty to be due for such time lost.

It is further agreed by the parties to this agreement that all money paid or advanced by said second party agreeably to the above stipulations and previous to mining said coal is and shall be so considered as advanced rents prepaid, and is to be deducted from the rents of the first excess of said minerals mined on said premises.

It is also agreed that all mineral mined on said premises is to be accurately weighed and the weight to be kept in a book which shall at all reasonable times be open for inspection of the said first party; and it is further agreed that the said party of the second part is to have the privilege of using said railroads, underground entries, buildings, and fixtures for the purpose of mining and removing either of said minerals from other lands, and after the said mine becomes exhausted or unminable they may continue the use of said railroads, underground entries, buildings, and fixtures by paying to the party of the first part the sum of forty — per year as long as they use them for transporting coal and iron ore. It is further agreed that said party of the second part shall have the right to abandon this contract at any time they shall determine that said coal and iron ore is in quantity, quality, or condition no longer minable with economy and profit, and remove their machinery and other structures and property from said land by paying all rents and royalty due. It is also agreed that the party of the second part will give to the party of the first part what coal he may need for the use of one dwelling-house free at the mouth of the pit
439 during the continuance of this lease, in consideration for which said second party is to have nut and slack coal free of royalty. It is understood that this lease is subject to the Bard and Blair leases. It is also understood that the coal under any permanent building on said land shall not be removed without the consent of the first party. The party of the first part reserves a lot of about six acres north of the public road and opposite his dwelling-house, and it is agreed that if the second party hereto fails to comply with the agreements herein contained this lease is to be null and void.

And we, the parties, by the signing and sealing of this contract, bind ourselves, our heirs, our assignees, and legal representatives to strictly adhere to the several covenants and agreements of this contract, as witness our hands and seals the day and year above written.

WALTER CURRIE. [SEAL.]
RALPH J. WICK,
By F. C. VAN DUSEN. [SEAL.]

Signed, sealed, and delivered in presence of—
C. W. WALKER.
ADAM CURRIE.
F. C. VAN DUSEN.

STATE OF PENNSYLVANIA, *County of Butler:*

On this 15th day of Oct., A. D. 1883, before me, a justice of the peace in and for said county, personally came C. W. Walker, the subscribing witness to the execution of the above instrument, who, being duly sworn, says that he did see the above-named Walter Currie and F. C. Van Dusen sign, seal, and as their act and deed deliver the same for the purpose therein set forth, and that the name of this deponent thereto subscribed as a witness is of
440 this deponent's own proper handwriting.

C. WALKER.

L. P. WALKER, *J. P.*

Endorsed: Filed Sept. 8th, 1883.

Coal Leases in Clay and Cherry Townships, Butler County, Pennsylvania.

John M. & Sarah Jane Chambers	30 acres.
Alex. Black	20 "
William Christie	90 "
James Kelly	65 "
Walter Currie	187 "
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All the above leases at 10c. for 2,240 lbs. Screened coal over 1½-in. screen. No charge for nut coal and slack, with the right to take it all away. There has been $1,305.84 paid on these leases as advance royalty, which is to be deducted from the first coal mined in excess of the yearly requirement. This land has all been properly tested by drilling, and at least 370 acres of the land contains coal of about 3 ft. 4 in. and as high as 3 ft. 8 in.

All of which is respectfully submitted.

FAYETTE BROWN, *Receiver,*
By J. J. WING, *His Att'y.*

441 And afterwards, to wit, on Jan'y 13th, 1885, the following supplemental report of master was filed in this cause, and which is in words and figures following, to wit:

In the Circuit Court of the United States, Eastern Division, Northern District of Ohio.

LAKE SUPERIOR IRON COMPANY
vs.
BROWN, BONNELL & COMPANY. } Equity, No. 4195.

Supplemental Report of Master.

Since filing my report as master as to the sums due to the various creditors of Brown, Bonnell & Co. certain creditors have admitted

certain payments to have been made by their having realized upon certain assets and judicial proceedings since the filing of said report, which I embrace in this report, viz:

I. The Fayette County National Bank of Pennsylvania, upon their claim No. 111 filed herein, have admitted, through their attorney, that on the seventh day of March, A. D. 1884, they received, through C. C. Sterling, sheriff of Fayette county, Pennsylvania, as the proceeds of a sale of property made under judicial proceedings in said county, the sum of twenty-four thousand one hundred and sixty-four and $\frac{59}{100}$ dollars ($24,164.59). The evidence of such payment having been made has been submitted to me this day (Jan'y 9th, 1885) by Fayette Brown, receiver, and has been filed with the claim above named and numbered. The evidence of the said credit was not sent to said receiver until long after the filing of my report, although the credit is dated prior thereto. The amount
442 due and reported in favor of said claimant in my original report, with interest to June 1st, 1884, was $77,424.95.

Upon the sum above named credit of $24,164.59, with interest from March 7th, 1884, should be applied, so that the sum originally reported should be reduced by the sum of $24,502.89, being principal and interest of the credit, which would leave the amount due said bank on June 1st, '84, at $52,922.06.

II. The claim of the Pittsburgh and Lake Erie Railroad Co., No. 92, should be reduced from the amount reported in my general report as due June 1st, 1884, by the sum of $289.91, which the claimant received on the 18th day of November, 1884, by virtue of certain legal proceedings in the court of common pleas of Allegheny county Pennsylvania, from the Pennsylvania Railroad Co., garnishee, on a claim due from said company to Brown, Bonnell & Co. The sum reported due on June 1st, 1884, to the claimant was $5,924.55. From this sum should be further deducted the above credit of $289.91, with int. from Nov'r 18th, 1884. See receipt filed with original claim.

III. The Second National Bank of Youngstown, O., claim No. 53, since the filing of my general report has been reduced by a payment thereon of $2,300.00 on November 1st, 1884. Part of the claim of said bank was a check dated Feb'y 16th, 1883, drawn by Brown, Bonnell & Co. on the Citizens' National Bank of Pittsburgh, Pennsylvania, payable to the order of the Mahoning Coal Co. The said Mahoning Coal Co. paid said check on the day named, viz., Nov'r 1st, 1884, out of that part of its earnings due Brown, Bonnell & Co., as one of the owners of said mine, as duly appears by
443 the receipt of H. G. Garlick, cashier of the Citizens' National Bank aforesaid, and which I have filed with its original claim. The claim allowed was $15,713.88, which should be reduced by said sum of $2,300 and interest.

All of which is respectfully submitted.

A. J. RICKS, *Master.*

(Indorsed:) Supplemental report of master. Filed Jan. 13, 1885. A. J. Ricks, clerk U. S. circuit court.

444 The following shows when various petitions of creditors were filed:

1883.

May 9. Petition of Upson, Walton & Co. filed.

" 10. Petitions of Wm. Tod & Co., Niagara Refining Co., the Moravia Limestone Co., Carbon Limestone Co., and the Greenville National Bank of Greenville, Pa., filed.

" " Petitions of McVey and Walker, B. F. Parsons, the Sharon National Bank, H. C. Frick Coke Co., the B. F. Goodrich Co., the Cleveland Malleable Iron Co., the Girard (Ohio) Savings Bank, the Otis Iron & Steel Co., Taylor Iron Co., Merchants' National Bank of Meadville, Penna., A. L. Truesdell, the Brush Electric Co., filed.

" 12. Petitions of John Carlin & Co., Pittsburgh, Pa.; Robinson, Rea & Co., Pittsburgh, Pa.; Cameron, Amberg & Co., Chicago, Ill.; Westerman, Filer & Co., Sharon, Pa.; Pendleton, Brother & Co., Rochester, Pa.; Monongahela Nat'l B'k of Brownville, Pa.; the Leadville Coal Co., Youngstown, O., filed.

" 12. Petition- of New York, Pennsylvania & Ohio R. R. Co.; Samuel Osborne & Co., Boston, Mass.; Edward H. Kellogg, N. Y.; Allegheny Coal Co., Youngstown, O.; the Chalmers Spence Co., N. Y., and Alberta Coal Co., New Lisbon, filed.

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1883.

May 14. Petition- of S. Obermayer & Co., A. Garrison & Co., William Liggitt, Joseph C. Bernnemann, Youngstown, Ohio, assigned to J. D. Boyle & Co., Pittsburgh, Pa.; the First National B'k, Garrettsville, Pa., filed.

" 15. Petitions of John B. Vinton, Youngstown, Ohio; the Shenango Coal Co., Youngstown, Ohio; Short and Foreman, Cleveland, O., filed.

" 16. Petition- of Woods, Perry & Co., W. H. Rickey, Sharon Coal Co., P. Jacobs & Sons, Erskine & Co., Youngstown, Ohio; the Lowell Limestone Co., filed.

" 17. Petitions of the Adams and Westlake M'f'g Co., the Brier Hill Stone Co., the Rossie Iron Works, Martin Singley, Erie, Pa.; Joseph H. Davis, Sewickley, Pa.; A. Armstrong, Warren, Pa.; David Jones, Youngstown, O., filed.

" 18. Petitions of Second National Bank of Youngstown, O.; First National Bank of Youngstown, O.; Wm. Cummings, treas. of Mahoning Co.; Park, Brother & Co., Pittsburgh, Pa.; Standard Oil Co., Youngstown, O.; Atwood & McCaffrey, Pittsburgh, filed.

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1883.

May 21. Petitions of R. L. Walker, Poland, Ohio; Edwin Bell & Sons, Youngstown, O., and Youngstown City Water Works filed.

" 23. Petitions of Foster Coal Co. and Andrews & Hitchcock, John Cannon, J. H. Outhwaite & Co. filed.

" 24. Petitions of Nelson P. Reed & Co., Pittsburgh, Pa.; Wilcox & Scaipe, Pittsburgh, Pa.; Mulliken, Boyd & Co., Youngstown, O., filed.

" 25. Petitions of the Electrical Supply Co., Ansonia, Conn.; United Pipe Lines, Oil City, Pa.; W. R. Everett, Allegheny, Pa.; Himrod Furnace Co., Youngstown, O., and the Lawrence Ore Co. filed.

" 26. Petition- of Geo. D. Wick, Cleveland, O.; Chess. Stoner, North Hope, Penna.; H. L. and E. A. Schwarzenburg, Cleveland, Ohio; Brooks Oil Co., Cleveland, O., and John S. Williams, Youngstown, O., filed.

" 28. Petitions of Hartley & Marshal, Pittsburgh, Pa.; Crocker Bros., N. Y., and Philips, Stewart & Co., Mercer, Pa., filed.

" 29. Petition- of Neenominee Mining Co., Milwaukee, Wis.;

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1883.

May 29. B. F. Rafferty & Co., Pittsburgh, Pa.; Florence Mining Co., Milwaukee, Wis.; the Witch Hazel Mining Co., Youngstown, O.; Park and Westlake, Youngstown, O.; the First National Bank of Mercer, Pa., and Mayer & Lowenstein, N. Y., filed.

" 30. Petitions of McMillin Oil Co., Cleveland, O., and Commercial National Bank, Cleveland, Ohio, filed.

" 31. Petition [of] American Nail Machine Co., Ashtabula, Ohio, filed.

June 1. Petition of the Pittsburgh & Lake Erie R. R. Co. and Lorenzo Lane filed.

" 2. Petition of Mackintosh, Hemphill & Co., filed.

" 4. Petition- of Dan. P. Eells, Wm. H. Harris, Henry H. Wick & Co., J. Park Alexander, Akron, Ohio; Wick Bros. & Co., Youngstown, Ohio, filed.

" 6. Petitions of Man'f*g*'s' & Traders' Nat'l Bank, Buffalo, N. Y.; Pratt & Co., Buffalo, filed.

" 7. Petition of the Penna. Co. filed.

" 7. Petition of A. & W. Powers, Youngstown, Ohio, filed.

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1883.

June 8. Petitions of Hiram Park, Youngstown, Ohio; C. Kane, Pittsburgh, Pa., and the National Bank of West Virginia, Wheeling, filed.

June 9. Petition of C. M. Roberts & Co., Pittsburgh, Pa., and Totten & Co., Pittsburgh, filed.
" 9. Petition of Dunbar Coke Co., Limited, Pittsburgh, Pa., filed.
" 12. Petitions of the Struthers Iron Co.; the National Bank of Fayette Co., filed.
" 13. Petition of the Port Royal Coal & Coke Co., Youngstown, O., filed.
" 14. Petitions of the Citizens' National Bank of Pittsburgh, Pa.; Second National Bank, Ravenna, O.; Niagara Refining Co. filed.
" 15. Petitions of the Geauga Savings & Loan Association, Chardon, O.; the Ashcroft Manufacturing Co., New York, filed.
" 16. Petitions of the Savage Fire Brick Co., New Cumberland, W. Va.; D. B. Chambers, filed.
" 16. Petition of Importers' and Traders' National Bank, N. Y., filed.
" 18. Petitions of Imperial Coal Co., Pittsburgh, Pa.; W. F. Sanford, Dunbar, Pa.; Chas. L. Mackey, James Marvey, Youngstown, O., filed.

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1883.

June 19. Petition of Arthur Conway, Erie, Erie Co., Pa., filed.
" 20. Petition of Phœnix Fire Brick Works, Pittsburgh, Pa., filed.
" 21. Petitions of H. Loomis & Co., Pittsburgh, Pa., and the Hubbard Nat'l Bank filed.
" 21. Petitions of the Jackson Iron Co. and Lake Superior Iron Co.; Henry C. Bonnell *et al.*, filed.
" 22. Petitions of William B. Conway, Warren, Ohio; the National Iron & Steel Publishing Co., Pittsburgh, Pa.; Warren Iddings, Warren, O., and the Republic Iron Co.; Clarence Walker, Butler, Pa., filed.
" 23. Petitions of Cartwright, McCurdy & Co., Youngstown, O.; First National Bank, Bellaire, Ohio, filed.
" 25. Petitions of Goppinger & Rush, Stambaugh, Thompson & Co., the Morris Hardware Co., J. H. Bushnell, A. B. Brownlee & Co., Nicholas Frech, the Ellis Planing Mill Co., Wick C. Gans, Geo. H. Dingledy filed.
" 26. Petition of Robert Hunter & Co., Youngstown, O., filed.
" 27. Petitions of the Pittsburgh Steel Casting Co., Pittsburgh, Pa., and Cleveland Rolling Mill Co., filed.

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1883.

June 29. Petition of Dillinger & Co., West Bethany, Pa., filed.
" 30. Petitions of Lang & Davison, Pittsburgh, Pa., and L. S. & M. S. R'y Co. filed.
July 2. Petition of the Wheatland Bessemer Steel Company of Pittsburgh, Pa., filed.

July 9. Petition of C. A. Otis filed.
" 10. Petition of Alexander & Co. and executors of Amasa Stone filed.
" 20. Petitions of Kirk Christy & Co., Warren, Ohio, filed.
" 29. Petitions of Brier Hill Iron & Coal Co., Youngstown, O.; Manning, McKeon & Co., Y., O., filed.
" 21. Petition of Jaricki M'f'g Co., Erie, Pa., filed.
" 23. Petition of Reid Bros., Dunbar, Pa., and E. W. Powers & Co., Youngstown, O., filed.
" 26. Petition of Job Evans, Youngstown, O., filed.
" 28. Petition of Farmers' and Mechanics' National Bank, Mercer, Pa., filed.
" 31. Petitions of Farmers' Deposit and Savings Bank, Poland, O., and the Shenango Machine Co., Limited, Sharon, Pa., filed.
August 1. Petitions of the American Exchange National Bank of New York and Pittsburgh National Bank of Commerce filed.
" 8. Petitions of the Iron Cliff Company, Negaunee, Mich.,

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1883.

Aug. 8. and Third National Bank of New York filed.
Sept. 3. Petition of John Geddes, Liberty, O., filed.
" 6. Petition of Monongahela Nat'l B'k of Brownville, Pa., filed.
" 6. Petition of Sidney Strong, Youngstown, Ohio, filed.
Oct. 20. Petition of Webb, Hart & Co., Boston, Mass., filed.

1884.

Feb'y 21. Petition of Lloyd G. Reed, assignee, filed.

452 And afterwards, on May 10th, 1883, the following petition was filed, viz:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

LAKE SUPERIOR IRON COMPANY *et al.*
vs.
BROWN, BONNELL & Co.
} Equity, No. 4195.

To the honorable judges of said court:

Your petitioner, The Greenville National Bank, a corporation duly organized and incorporated under the laws of the U. S. and doing business in Greenville, Mercer Co. and State of Pennsylvania, respectfully shows that this petition is filed in the above entitled cause in pursuance of an order of said court hereinbefore made; that said bank is a creditor of the said defendant, Brown, Bonnell & Co., of Youngstown, Ohio, in the sum of nine thousand seven hundred and

five $\frac{35}{100}$ dollars ($9,705.35); that the said claim is just and unpaid, and is described as follows, to wit: One promissory note, Chicago, Nov. 1, 1882, signed by J. V. Ayers & Sons, for forty-eight hundred seventy-three $\frac{19}{100}$ dollars, payable to Brown, Bonnell & Co. on the 19 March, 1883, at the U. Nat. B'k, and endorsed by Brown, Bonnell & Co., which was duly presented at said Union Nat. B'k on the 22 Mar., 1883, and payment having been refused was duly protested against the said makers and endorsers, protest fees being paid by us, two $\frac{58}{100}$ dols.; also another note, dated Chi., Dec. 2, 1882, signed by the same persons, for forty-eight hundred thirty-two $\frac{16}{100}$ dols., payable to the same parties on the 14 Apr., 1883, at the same place, and endorsed as aforesaid by Brown, Bonnell & Co., which was duly presented at said Union National Bank on April 17th, 1883, and payment being refused was duly protested as aforesaid, sum being paid by us as aforesaid; that copy of said two notes is hereto attached and made a part of this petition.

Your petitioner further shows that it holds no security for said claim except as follows aforesaid.

Wherefore your petitioner prays that the said claim may be adjudged to be a valid claim against the property and assets of said Brown, Bonnell & Co., and that out of the proceeds arising from the sale of such property and assets said claim may be paid under such orders and decrees as the court shall deem equitable and just, and for all such other and further relief as your petitioner may in equity be entitled to.

GREENVILLE NAT. BANK.
WM. H. BEIL, *Cashier.*

STATE OF PENNSYLVANIA, }
Mercer County, } *ss:*

William H. Beil, being duly sworn, says that he is cashier of the Greenville Nat. Bank, and as such duly authorized to make the proof of claim aforesaid, and that the allegations of the foregoing petition are true.

[SEAL.] WM. H. BEIL.

Sworn to before me and subscribed in my presence this ninth day of May, A. D. 1888.

E. J. TEMPLETON,
Notary Public.

453 $4,873.19. CHICAGO, *Nov.* 1, 1882.

On March 19, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. forty-eight hundred seventy-three $\frac{19}{100}$ dollars at the Union National Bank, value received.

No. —. Due March 19–22, '83.

JOHN V. AYERS & SONS.

Protested for non-payment 22nd March, 1883.

A. W. MARTIN,
Notary Public.

Endorsed: Brown, Bonnell & Co., by F. H. Mathews, tr.

$4,832.16. CHICAGO, *Dec.* 2, 1882.

On April 14th, 1883, after date, we promise to pay to the order of Brown, Bonnell & Co. forty-eight hundred thirty-two $\frac{16}{100}$ dollars at the Union National Bank, value received.

No. —. Due Apr. 14–17, '83.

JOHN V. AYERS SONS.

Protested for non-payment 17 April, 1883.

A. W. MARTIN,
Notary Public.

Endorsed: Brown, Bonnell & Co., by F. H. Mathews, tr.

454 THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

I, Martin W. Sanders, clerk of the circuit court of the United States within and for said district, do hereby certify the foregoing to be true copies of the original subpœna, appearance, receiver's bond, affidavit of H. H. Brown, order directing receiver to institute suits, order to marshal to turn over to receiver certain attached property, subpœna under supplemental bill, order to receiver to lease certain premises, appearance of A. W. Jones *et al.*, order to creditors to file petition, petition of Rossie Iron Works, petition of Florence Mining Co., petition of Manufacturers' and Traders' Bank, order *pro confesso*, order appointing A. J. Ricks special master, &c., order to receiver to transfer certain indebtedness, report of master on claim Florence Mining Co., exceptions to report Florence Mining Co., summons for H. C. Ayer, bill of Citizens' Nat'l Bank of Pittsburgh, motion of Citizens' Nat'l Bank of Pittsburgh, demurrer of R. J. Wick, petition of Importers' & Traders' Nat'l Bank of New York, suggestions by John Hay *et al.*, bill of Rossie Iron Works, order making Citizens' National Bank of Pittsburgh parties, order making Importers' & Traders' National Bank parties, motion to strike demurrer — Wick from files, motion to strike pleas from files, cross-bill Commercial National Bank, order striking demurrer — Wick from files, also motion of Mathews, &c., leave to Commercial Nat'l B'k *et al.* to file answers, &c.,
455 reply to answer Commercial National Bank, motion to strike from files answer Commercial National Bank, order that answer Commercial National Bank be treated as intervening petition, answer Ravenna National Bank, response Man'f's' & Traders' National Bank, final report of master, testimony filed therewith, report of master upon claims of creditors, order for defendant corporation to answer exceptions to master's report, order overruling exceptions, order approving master's report upon claims of creditors, subpœna against Brown, Bonnell & Co., order *pro confesso*, motion by M'f's' & Traders' Nat'l Bank *et al.* to withdraw from answer Commercial Nat'l B'k, order granting leave to withdraw, exceptions by Commercial Nat'l Bank *et al.* to master's report, exceptions by C. S.

Warden to master's report, exceptions by Crawford to master's report, motion to strike exceptions from files, joinder by def't corporation *et al.*, motion to strike from files response, &c., G. S. Warden, motion to strike out def't's joinder, decree, order to receiver to take account of assets & report, report by receiver pursuant to above order, supplemental report of master, entries upon the appearance docket showing when petitions of creditors were filed, petition of Greenville National Bank in the above-entitled cause in said court, and that the same are correctly copied from the originals now on file and on record in my office.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 5th day of Sept., A. D. 1889, and in
456 the 114th year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

MARTIN W. SANDERS, *Clerk.*

Endorsed on cover: Supreme Court U. S. 1889, October term. No. 227. Brown, Bonnell & Co., appellants, *vs.* The Lake Superior Iron Co. *et al.* Amendment to record filed by appellees (see stipulation filed May 25, 1889).

[Stamped:] Office Supreme Court U. S. Filed Oct. 3, 1889. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED.
DEC 5 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 227.

BROWN, BONNELL & CO.

vs.

LAKE SUPERIOR IRON COMPANY AND OTHERS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT.

HENRY CRAWFORD,
SOLICITOR FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 227.

BROWN, BONNELL & CO.
vs.
LAKE SUPERIOR IRON COMPANY AND OTHERS.

Appeal from Circuit Court of the United States for the Northern District of Ohio.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT.

On February 20, 1883, a bill in equity was filed by the Lake Superior Iron Company, the Jackson Iron Company and the Negaunee Concentrating Company, against the appellant.

It stated that the latter was a corporation organized under the laws of Ohio; the Lake Superior Iron Company held its three promissory notes, aggregating $13,776.75, *none of which were then due;* the Jackson Iron Company held two promissory notes aggregating $14,723.86, *neither of which were then due*, and the Negaunee Concentrating Company had recovered a judgment for $5,110.40 on the common law side of the court on the very day the bill was filed.

On behalf of complainants and all other creditors it was also averred that appellant was heavily engaged in the manufacture of iron, owned and operated blast furnaces, rolling-mills, coke-works and coal mines; employed 4,000 operatives in its mills and works; that its plant, good-will and business were of great value; without giving any detail whatever, it was averred that vexatious litigation had been commenced against the defendant, accompanied by attachments and seizures, which would give to the creditors pursuing them an undue and unjust advantage "over your complainants whose claims are not "yet due;" would endanger the valuable property of the defendant, destroy the value of its good-will as an asset and thereby cause great and irreparable injury to complainants and other creditors. It was alleged in general phrase that "the defendant was insolvent," and if the court did not preserve the property and assets by the appointment of a receiver a large number of laborers would be discharged and thereby cause a stoppage of the extensive business of the defendant.

The only prayer of the bill was for the court to appoint a receiver "to take charge of the property and "assets of the corporation" and for general relief. (Rec., 1, 2.)

On the same day without other showing than the verified bill, the court entered an order appointing a receiver with authority to take possession of all the money and assets, real and personal and generally all the rights, property and credits of the defendant, with specific direction "to continue the operation of the works and the "business of said defendant in the mode and manner, "that it has heretofore been carried on by said company." (Rec., 5, 6.)

On March 28, 1883, a so-called supplemental bill was filed. It contained no material averments of new facts. The only supplemental matter stated was the inconsequential allegation, that after the filing of the bill, whereby the equitable levy on all appellant's property was accomplished, an execution had been issued on the judgment at law and returned unsatisfied.

It claimed that the Negaunee Concentrating Company's judgment was a lien upon all the defendant's real estate within the district, that there were numerous creditors and other liens and priorities claimed and divers demands preferred "the justice of which is doubtful and many ap- "parently just claims are unliquidated and not properly "ascertained in their amounts." It made divers stockholders, defendants, in order that their individual liabilities might be enforced. The prayer for relief was that a special master should determine all the priorities of liens on the corporate property, and determine the rights of claimants; that all creditors be notified by mail to present their respective claims to the receiver for allowance, and on final hearing a sale of all the defendants' property should be decreed, and the stockholders' liability be enforced to make good any deficiency. (Rec., 3, 4.)

No leave was ever asked for or given to justify the filing of this supplemental bill, and no copy served or rule taken against the defendant to plead thereto, or notice given of its filing.

By the standing rules no answer, plea or demurrer was due from appellant on the original bill until May 7, 1883, (Add. Rec., 5,) yet on April 22, 1883, an ex parte decretal order was entered requiring all defendant's creditors within sixty days to file their claims by verified petitions in the clerk's office. (Ad. Rec., 12.)

On March 23, 1883, the receiver filed an inventory of the defendants property of which he had taken possession under the order, consisting of a large amount of real and personal property of an estimated value of $2,125,709.66. (Rec., 7, 8.)

On June 14, 1883, a solicitor's order that the original and supplemental bills should be taken *pro confesso* was entered in the book. (Ad. Rec., 21.) On July 17, 1883, a special master was appointed to hear and determine the rights of the several creditors of the defendant who have filed their claims and "from such "proofs as may be produced before him on giving the "usual notice" to ascertain the amount justly due to each such creditor and to adjudge and marshal the liens and priorities of such creditors and to report his findings. (Ad. Rec., 22.)

On November 24, 1883, the appellant filed its pleas under oath showing: *First*, that on November 24, 1883, it had fully paid and satisfied the judgment of the Negaunee Concentrating Company, stated in the bill, together with interest and costs. *Second*, that the bill and supplemental bill show that the complainants have a plain, adequate and complete remedy at law, and therefore equity had no jurisdiction. (Rec., 9.)

On December 18, 1883, the defendant filed its written motion to discharge the receiver, for similar reasons to those stated in the pleas, which motion on December 24, 1883, was overruled. (Rec., 10.)

Prior to final decree, divers alleged creditors, by petitions, claimed the benefit of the suit. They were, without exception, creditors at large without judgment or other lien and none of them held any claim which was even due and enforcible when the bill was filed.

The special master on June 11, 1884, filed his report, stating the amounts due to 176 separate creditors. (Rec., 34, and schedules attached.)

The allowances aggregated $1,320,649.92 including interest to June 1, 1884. The report shows that in nearly all the allowances no evidence other than the verified claim itself was offered; so far as shown all such claims were verified before a notary public; that twenty-four of such allowances, aggregating over $500,000, were not based on any primary liability of the appellant, but solely on a secondary and contingent liability as endorser on the commercial paper of other parties without any proof of protest or notice; that divers of such demands were for unliquidated damages, and none of such claims were due or enforcible on February 20, 1883, when suit was brought. (Add. Record, 13, 14, 19, 27, 45, 252.) It wholly fails to show that any process, notice or master's summons on any of these claims gave jurisdiction over the person of appellant to adjudge them, or that it had any notice of the master's hearing or proof.

The receiver's report of December 31, 1885, showed that he had on hand cash and personal property, other than that connected with the plant, amounting to over $530,000 after paying all the liabilities, taxes, etc. (Add. Rec., 37.)

On February 23, 1886, the court entered a final decree finding the corporation was insolvent and indebted to divers creditors in the sums recited at length in the decree for the payment of which, thirty-two parcels of real estate in Ohio, including the plant, fixtures, machinery, tools, locomotives, cars, raw material and supplies; also stock in a coal company, interest in a partnership, five leases of coal land in Pennsylvania, and the right to remove

sand and gravel from a certain other described parcel of land should be sold; that except a single claim all creditors should be paid on an equality. It further decreed that the appellant should within five days pay the sums so adjudged against it, a portion of which was compound interest on every claim awarded by the court, or in default of such payment all its real and personal property "except "materials and supplies and products manufactured or in "process of manufacture" should be appraised, advertised and sold as upon a judgment at law in one parcel and without division, and reported to court for confirmation. It was also ordered that the receiver, at his discretion, should sell all the materials and supplies and product manufactured or in process of manufacture at private sale. (Rec., 38.)

On March 29, 1886, an appeal was prayed and allowed and a supersedeas bond approved.

Errors Assigned.

1. The Circuit Court had no jurisdiction whatever over the subject-matter of the suit, because it appeared on the face of the pleadings that the complainants had a plain, adequate and complete remedy at law.

2. It had no jurisdiction to appoint a receiver.

3. It erred in appointing a receiver, because no case was made justifying such appointment and thereby ousting the regular statutory officers.

4. In overruling the motion of appellant to vacate the order appointing the receiver.

5. In refusing to sustain the pleas of defendant and dismiss the suit for want of jurisdiction.

6. In entering a decree before any answer was due from appellant, directing all its creditors to file their respective claims in the cause; and thereupon proceeding to adjudge and render money judgments thereon *ex parte*, without either process, notice or lawful proof.

7. In entering the decree *pro confesso* against appellant.

8. In entering a final decree, which was wholly unsupported by either allegation or proof.

9. In decreeing the sale of mere legal assets not identified in the pleadings, consisting of specific real estate and personal property, all of which was unincumbered and subject to seizure and sale on executions at law.

10. In awarding mere money judgments against appellant in favor of divers creditors, and thereby destroying its constitutional right of trial by jury.

11. In rendering money judgments against appellant in favor of divers creditors when none of their alleged claims were due and enforcible when the action was brought.

12. In awarding compound interest to all creditors.

13. In ordering the sale of real estate and personal property in one parcel, contrary to the express statutes of Ohio.

14. In decreeing the sale of real estate on execution before the personal property of appellant was exhausted.

15. In ordering the receiver, without notice or appraisal, to sell at private sale, at his discretion, a large and unspecified amount of personal property.

16. In assuming jurisdiction in the absence of all fraud, or obstruction to ordinary legal remedies, to wind up the affairs of the appellant, decree the sale of all its property and distribute the same among simple contract creditors who had neither judgment, execution, lien or matured debt when suit was brought.

Brief for Appellant.

The following propositions are relied on for reversal:

I. This suit was of such a character that the circuit court was expressly prohibited by act of congress from exercising any jurisdiction.

While the absence of adequate legal remedy was the original and characteristic test of chancery power, that doctrine has been unalterably fixed in the Federal system of jurisprudence as a statutory prohibition.

It is declared in *N. Y. Guar. Co.* v. *Water Works Co.*, 107 U. S., 20, that the act of Congress, (Rev. Stat., Sec. 723) "suits in equity shall not be sustained in either of "the courts of the United States in any case where plain, "adequate and complete remedy may be had at law" was intended to emphasize the original restrictions on chancery power and to "impress it on the attention of the "courts."

It is an inflexible rule that the judicial power of the United States is not to be exerted in a case to which it does not extend, even if all parties desire to have it extended.

Thompson v. *R. R. Cos.*, 6 Wall., 134.
N. C. & L. M. Ry. v. *Swan.* 111 U. S., 134.

The restrictions on equity power thus established by express enactment are regarded as jurisdictional. For that reason they can not be waived or disregarded by either the acquiescence or active consent of parties. Judicial duty requires that the court at any stage of the

cause shall enforce the prohibition, *sua sponte*, wholly independent of the pleadings or wishes or conduct of the parties.

Grand Chute v. *Winegar*, 15 Wall., 374.
Killian v. *Ebbinghaus*, 110 U. S., 568.

Not only is such limitation statutory, but in *Root* v. *Railway Co.*, 105 U. S., 206, Justice MATTHEWS says: "It is "the settled doctrine of this court that this distinction of "jurisdiction between law and equity is *constitutional*, to "the extent to which the seventh amendment forbids any "infringement of the right of trial by jury as fixed by the "common law."

Fussell v. *Gregg*, 113 U. S., 550.
Hipp v. *Babin*, 19 How., 271.

In determining whether a cause is properly the subject of equitable cognizance, the well established rule is, that reference must be had to the administration of equity law as defined and enforced by the English chancery courts.

Penn v. *Holme*, 21 How., 481.

On this appeal the primary inquiry arises, whether according to such test, the Circuit Court, considering the nature of the complainants' demands and the showing of their pleading, had rightful jurisdiction to ascertain these debts, render money judgments in their favor and also for all other creditors at large; to decree the sale of appellants' property and distribution of the proceeds and to sequestrate all its assets to abide such result.

The equity jurisdiction was invoked by three creditors. Two held promissory notes, which were not due when the suit was brought. The other complainant had a small judgment which had been recovered on the common

law side of the Circuit Court on the very day the bill was filed therein.

It was expressly stated in the bill that the appellant owned and operated large and valuable properties, and was "a going concern" then employing 4,000 operatives and possessed of an existing business and goodwill of great value.

All this real estate was within the territorial jurisdiction of the Circuit Court as shown by the pleadings and decree. The original bill contained no averment showing either the issue or return of an execution.

The supplemental bill distinctly claimed that this judgment of the Negaunee Concentrating Company was a lien on all the defendant's real estate.

The supplemental matter stated was that execution had been issued on this judgment after bill filed and that the process had been returned unsatisfied.

Neither of the pleadings charged that the defendant did not have property subject to execution at law sufficient to pay all the debts held by complainants. Neither assert any fraudulent wasting of assets or any intended or accomplished mismanagement, dishonesty, or breach of trust on the part of the directors or officers of the appellant. Neither express any claim that the latter had made or intended to make any assignment, conveyence, confession of judgment or commit any other act for the purpose of defrauding or delaying creditors, or that there was any cloud upon the large and valuable real estate and personal property which it owned, or that any obstruction existed to the enforcement of ordinary legal process upon the corporate property.

On the very application for equitable aid it therefore

appeared that the defendant was a debtor in active and large business, owning unincumbered and unclouded legal assets, largely more than sufficient to satisfy the claims originally sued on.

Unless every known principle of chancery procedure is to be disregarded, a federal court has no equitable cognizance of such a suit, because for all complainants the legal remedy was ample and apparent.

The right of these three creditors to sustain the equitable jurisdiction and obtain the decree, must necessarily be dealt with precisely as though each had filed a separate bill.

Schwed v. *Smith*, 106 U. S., 188.
Seavers v. *Bigelow*, 5 Wall., 208.

The jurisdiction and regularity of the decree must be determined on the equity of the complainants alone. Until an interlocutory decree enabling other creditors to present their claims, it is the suit of the actual plaintiffs. Until decree the record plaintiff may deal with the suit as he pleases.

Woodgate v. *Field*, 2 Hare, 211.

Other creditors proving in the master's office come in under submission to the decree and cannot supply an equity that was originally lacking.

(1.) *The status of the judgment creditor.*

A judgment standing alone constitutes no title to equitable aid.

The basis on which creditor's bills are maintainable was stated at an early day by Ld. Nottingham in an anonymous case, cited in *Balch* v. *Walstall*, 1 P. Wms., 445, "that "one who had a judgment and had lodged a *fieri facias*,

"in the sheriff's hands to which *nulla bona* was returned, "might afterwards bring a bill against the defendant or "any other to discern any of the goods, or personal estate "of the defendant, and by that means effect the same."

That a judgment, execution and its return unsatisfied are indispensable conditions precedent to a creditor's right to proceed in equity, to reach and apply assets not subject to execution has been so uniformly decided that it is no longer an open question.

Marsh v. *Burroughs*, 1 Woods., 468.
Cov. Bridge Co. v. *Shepherd*, 21 How., 112.
Ogilvie v. *Knox Ins. Co.*, 22 How., 380.
Case v. *Beauregard*, 99 U. S., 119.
Ex parte Boyd, 105 U. S., 647.

One of the oldest rulings on this subject holds a judgment creditor who desires to enforce his security against his debtor's equity in freehold estate by a bill in chancery must previously sue out an *elegit*, and if his bill does not allege that he has done so, it is demurrable.

Angell v. *Draper*, 1 Vernon, 398.
Neat v. *Duke of Marlborough*, 2 M. & C., 408.
Ld. Redesdale Treat., 126.
2 Story Eq. Jur., § 1,216.

The equitable aid is purely auxiliary. It is based solely upon the inadequacy of the legal process. The case stated must therefore affirmatively show that the legal remedy has been actually attempted and proven fruitless, and that the fund sought to be reached for the satisfaction of the debt ascertained by judgment, is accessible only through a court of chancery.

Edgell v. *Haywood*, 3 Atky., 359.

A judgment creditor cannot maintain any suit at all until he has taken the steps necessary for acquiring a charge upon the property. He must go to the point at which he will be met by the obstruction before he can say he is embarrassed by it. Till he can do so he can have no *locus standi* in equity.

Mitford, P. 1, 101.
Smith v. *Hurst*, 10 Hare, 78.

There are two grounds on which suits of creditors seeking to satisfy their claims out of the debtor's property can be sustained in equity.

The ruling of Chan. Walworth in this respect, has been uniformly adopted by this and other courts.

It is: (1.) When property sought to be affected is subject to execution and a fraudulent obstruction is interposed to prevent a sale, a creditor may file his bill to remove the obstruction as soon as he has obtained a specific lien upon the property either by judgment or execution.

(2.) If the property is not subject to levy and sale on execution, the creditor must show his remedy at law exhausted by an actual return of the execution unsatisfied, before he can file a bill in the court to reach the equitable assets.

Beck v. *Burdett*, 1 Paige, 305.
Brinkerhoff v. *Brown*, 4 Johns. Ch., 677.
Bank v. *Atwater*, 2 Paige, 54.

The reason of the rule in the last instance results from the analogy to legal methods which equity adopts.

In discussing the subject of creditors' suits and equitable assets, Justice MATTHEWS said:

"But the execution must be sued out, for if the estate "sought to be subjected is a legal estate and subject to "be taken in execution, the ground of the jurisdiction in "equity is merely to aid the legal right by removing ob- "stacles in the way of its enforcement at law, and if the "estate is equitable merely and therefore not subject to "be levied on by an execution at law, the judgment cred- "itor is bound nevertheless to put himself in the same "position as if the estate were legal, because the action "of the court converts the estate so as to make it subject "to an execution as if it were legal."

Freed. S. & T. Co. v. *Earle*, 110 U. S., 710.

When the proper interpretation to be placed upon a law of Maine was under discussion, even though the enactment was silent as to the necessity of an execution in order to ripen the creditor's right to equitable aid, this court ruled that by implication the writ was essential, because the requirement of an actual fruitless legal attempt was an established rule in equity. "When it is attempted by "equitable process to reach equitable interests fraudu- "lently conveyed, the bill should set forth a judgment, is- "sue of execution and its return unsatisfied." It was on this distinct ground, consequently adjudged that the statutes of limitation did not begin to run until the equitable cause of action had fully accrued to the creditor by the return of *nulla bona* on his writ.

Taylor v. *Boker*, 11 U. S., 110.

Jones v. *Green*, 1 Wall., 330, distinctly approved the doctrines of *Beck* v. *Burdett*, and is decisive of this appeal.

The bill in that case averred a judgment, that the

debtor had suspended business, had fraudulently conveyed property and was insolvent.

The bill was dismissed solely because the complainants failed to prove the issue and return of an execution. "The objection that the complainants have not shown any "attempt to enforce their remedy at law is fatal to the re- "lief prayed. A court of equity exercises its jurisdiction "in favor of a judgment creditor only when the remedy "afforded him at law is ineffectual to reach the property "of the debtor or the enforcement of the legal remedy is "obstructed by some incumbrance upon the debtors' prop- "erty or some fraudulent transfer thereof." "The case, "therefore, stands as a suit in equity commenced for the "satisfaction of judgments before any attempt had been "made for their collection at law by the issue of execu- "tion thereon. That the suit cannot be maintained under "these circumstances is clear both upon principle and au- "thority."

It is obvious from the pleadings and decree herein that the action of the court in this case cannot be sustained under either of the conditions originally stated in *Beck* v. *Burdett*, and followed in *Jones* v. *Green*.

The jurisdiction in the first class of cases deals only with legal estates and proceeds exclusively upon the well recognized chancery power to redress frauds and set aside clouds upon the legal right.

Here the estate sought to be reached was, it is true, subject to execution, but there was neither allegation nor proof of fraud or obstruction to usual legal process, on which basis alone the jurisdiction is upheld.

As this proceeding did not seek to reach equitable assets not accessible to ordinary levy and complain-

ants did not show a judgment and unsatisfied execution before bill filed, the suit was obviously not within the justification of the second rule.

The only grounds on which chancery jurisdiction could rest did not exist on either theory.

By adoption of the state statutes of Ohio, constituting judgments a lien upon real estate, this judgment of $5,110.40 was a first lien on real estate, worth according to the official inventory of the receiver over $1,300,000. The supplemental bill expressly claimed the benefit of such lien. Over $300,000 of personal property was subject to an execution thereon. All this tangible property was within the district, in the possession of the judgment debtor, with no obstruction whatever preventing the usual levy thereon, sale and satisfaction.

So far as this judgment creditor was concerned, nothing can be plainer than that an execution sued out on its recovery at law afforded a plain, adequate and complete remedy and would have produced prompt and full satisfaction of its demand.

That being apparent on its own showing, it is unheard-of doctrine that a creditor has an election to forego his remedy by execution and compel the court on its equity side to sell the identical property he could as effectually and much more speedily subject by his legal writ. In such a contingency equity would perform no judicial function whatever but only subserve the purpose of a lagging *fi. fa.* .Equivalent and equally accessible remedies would thus be afforded a judgment plaintiff to sell the same property.

Two such concurrent remedies to collect ordinary money demands, one in equity and the other at law is an anomaly not to be found in any branch of jurisdiction. If

any such practice was tolerated, the legal remedy would soon become obsolete as completely as if it had been abolished by legislation.

Birdsall v. *Coolidge*, 93 U. S., 64.

Nor is the ordinary equity jurisdiction aided by any local statute of Ohio enlarging the remedies of creditors, or remitting the observance of usual prerequisites to equitable aid.

Sec. 916 Rev. Stat. U. S., regulating common law procedure, applied to the judgment of the Negaunee Concentrating Company. It became thereby entitled to "similar remedies upon the same by exe- "cution or otherwise to reach the property of the judg- "ment debtor, as are now provided in like causes by the "laws of the state in which such court is held."

The statutes of Ohio then in force provided a special remedy in the nature of a creditor's bill upon judgments in the state courts, as follows:

"When a judgment debtor has not personal or real "property subject to levy on execution sufficient to sat- "isfy the judgment, any equitable interest which he has "in real estate as mortgagor, mortgagee or otherwise, or "any interest he has in any banking, turnpike, bridge or "other joint stock company or in any money contract, "claim or chose in action due or to become due to him, "or in any judgment or order, or any money, goods or "effects which he has in the possession of any person or "body politic or corporate, shall be subject to the pay- "ment of the judgment by action." (Rev. Stat. Ohio, Sec. 5,464.)

The highest court of Ohio has in repeated decisions interpreted this enactment and rigidly held that the sole

condition on which a debtor's equitable assets can be reached, is on averment and proof that he has not real and personal property subject to execution sufficient to satisfy the judgment. No other substituted allegation is accepted as sufficient.

Gilmore v. *Miami Ex. Co.*, 2 Ohio, 294.
Bambergan v. *Turner*, 13 Ohio S., 270.
Bonny v. *Odell*, 4 Ohio S., 623.

A creditor was denied relief when it appeared that his execution had been levied upon realty which was undisposed of and there was also other property subject to levy.

Hubble v. *Perrin*, 3 Ohio, 287.

The Ohio statutes, Sec. 5472, further authorize proceedings supplementary to execution against the judgment debtor and third persons, to subject the property and choses in action in their hands to the satisfaction of the judgment, whenever it is made to appear by affidavit that "an execution on the judgment has been returned unsat-"isfied."

The statute in express words, required the existence of the same conditions precedent which the settled rules in equity do.

This local statute therefore, together with the judicial construction affixed thereon, by force of the act of Congress furnished, defined and limited the remedies "by execution or otherwise," to which the creditor by judgment in the Federal court wase ntitled. *Ex parte* Boyd, 105 U. S., 647. They were to be "similar" to the remedies allowed on state court judgments. The language is both enabling and restrictive. A creditor with a Federal court judgment is not thereby allowed to reach the prop-

erty of his debtor under allegations which would not give a judgment creditor of a state court a similar remedy. Undeniably if the judgment of the creditor filing this bill had been rendered by a state court, the present proceeding would have been summarily dismissed, because it not only omitted the essential averment required by a mandatory statute, but affirmatively disclosed the debtor's ownership of property subject to levy, amply sufficient to satisfy the judgment.

It follows that the judgment creditor joining in the bill exhibited no title to equitable relief. The admission of adequate property subject to the process at law was fatal to the jurisdiction on its suit, both on general principles and under the adopted state legislation.

The showing of the supplemental pleading that after bill filed a writ had been issued on the judgment and returned unsatisfied, did not supply the primary lack of jurisdiction or furnish any equitable basis for the subsequent action of the court.

A contrary view mistakes the office of a bill of supplement. It is not a new suit, but the continuation of an existing one. Facts which constitute the basis of equitable cognizance must exist when the original bill is filed, and cannot be created at a later date.

In *Brown* v. *Bank*, 31 Miss., 454, the identical question arose. It was there decided that the filing of a supplemental bill showing the issue of an execution and its return unsatisfied after suit brought would not suffice to save the action from dismissal for want of equitable jurisdiction.

Candler v. *Pettit*, 1 Paige, 168.
Brinkerhoof v. *Brown*, 4 Johns. Ch., 671.

Notwithstanding the return the fact was undeniable that there was abundant leviable property.

Certainly no substantive equity could be created by the issue and return of legal process when the creditor on the same judgment had previously accomplished the seizure of all his debtor's estate by means of its own equitable execution and thereby physically prevented the legal process from being operative.

(2.) *The status of the two creditors at large.*

When they brought this equitable action they were not even clothed with a right to institute a suit at law because none of their demands had become due or enforcible.

The judgment embraced in the bill was fully paid and its lien discharged in November, 1883, over two years before the final decree. Necessarily this left the suit to be maintained solely by creditors at large. Those who proved up under the decree were of the same class.

The record shows, therefore, that the Circuit Court entertained equitable cognizance, at the suit of common creditors holding unmatured debts, to sequester all the property of their debtor and thereupon to comprehensively ascertain the sums due to all its creditors, award judgments and order the sale of specific legal assets to satisfy them.

The file affords no precedent for such an extraordinary exercise of equity power.

It is a rule without exception, that equity in the absence of some statutory enlargement of authority, will not entertain the suit of a creditor at large seeking payment of a mere money demand or grant him any relief whatever either by way of ascertaining his debt, rendering judg-

ment thereon, impounding the debtor's property or interfering in any way with his absolute dominion and unrestricted power of alienation.

The precedents can be multiplied without number which enforce this elementary doctrine, that such "a "creditor has only the right to prosecute his claim in the "ordinary courts of law and have it adjudicated, before "he can pursue the property of his debtor by a direct "proceeding in equity."

Case v. *Beauregard*, 99 U. S., 119.
Bank v. *Bates*, 120 U. S., 556.
Van Weel v. *Winston*, 115 U. S., 228.
Root v. *Railway Co.*, 105 U. S., 189.

Wiggins v. *Armstrong*, 2 Johns. Ch., 144, is a leading case on this topic. The attempt was there made by a creditor on simple contract after an action at law commenced by him, to control in chancery by injunction an alleged fraudulent disposition of his debtor's property. The chancellor dissolved the injunction and denied the existence of any such chancery power, because unless the creditor "has a certain claim upon the property of the "debtor he has no concern with his frauds."

The opinion says:

"In *Angell* v. *Draper*, 1 Vernon, 390, and *Shirley* "v. *Watts*, 3 Atk., 200, it was held that the creditor must "have completed his title at law by judgment and exe-"cution before he can question the disposition of his debt-"ors' property, and in *Bennett* v. *Musgrave*, 2 Ves., 51, "and in a case before Lord Nottingham, cited in *Balch* v. "*Watstall*, 1 P. Wms., 445, the same doctrine was de-"clared, and so it is understood by the elementary "writers."

Mitford Pl., 115.
Cooper's Eq. Pl., 149.

This authority was expressly approved and made the basis of decision by this court in a cause where a creditor on simple contract sought to reach choses in action of his debtor.

"Nothing is better settled than that such a bill must "be preceded by a judgment at law, establishing the "measure and validity of the demand of the complainant "for which he seeks satisfaction in chancery."

Smith v. *Railroad Co.*, 99 U. S., 398.

The highest court of Ohio maintains the same view.

Clark v. *Strong*, 16 Ohio, 317.

The vague averment in the bill that the defendant was "insolvent" does not create any equity or charge upon property, or in any respect prevent the application of the principle which inflexibly denies the right of non-judgment creditors to equitable aid against the debtor's property.

In the absence of express legislation enlarging the jurisdiction, the uniform course of decision is that a charge of insolvency, even resulting from fraud, "does not dis-"pense with the general rule that a debt must be ascer-"tained by judgment and legal remedies exhausted be-"fore the creditor can proceed to collect it out of assets "liable in equity for its payment."

Estes v. *Wilcox*, 67 N. Y., 264.
Baxter v. *Moses*, 77 Maine, 476.
Adsit v. *Butler*, 87 N. Y., 585.
Adee v. *Bigler*, 81 N. Y., 349.
Smith v. *Railroad Co.*, 99 U. S., 401.

In thus decreeing primary relief in equity to creditors who had not "established the measure and validity of their "demands at law," the Circuit Court not only disregarded the prohibition of the act of Congress restraining equitable jurisdiction, but also invaded and destroyed the appellant's constitutional right of trial by jury.

The two complainants who held unmatured promissory notes were clothed with no equity whatever. They held mere legal demands which on maturity and non-payment would entitle them to resort to ordinary legal remedies for relief. They had no *other* right whatever. They were not clothed with any equity. On the other hand the appellant had the right to join issue, dispute the validity and amount of such alleged debts and insist that they should be established by the verdict of a jury. The rights and obligations presented were essentially legal and primarily determinable in an action at law. They sued primarily in equity to enforce the payment of ordinary commercial paper.

Chancery, usurping the powers of a common law tribunal, proceeded to ascertain the validity and amount due them and awarded a pecuniary recovery to be collected by execution.

Such exercise of judicial power was a plain denial of the right of jury trial, because mere legal rights were ascertained and determined and no equitable rights were regarded or equitable remedies administered.

Parsons v. *Bedford*, 3 Peters, 433.
Thompson v. *Railroad Co.*, 6 Wall, 137.
Lewis v. *Cocks*, 23 Wall., 466.
Hipp v. *Babin*, 19 How., 271.
Root v. *Railway Co.*, 105 U. S., 206.

Chancery is without power to grant decrees which are in effect mere judgments at law. It is a cardinal test that to give a court of equity jurisdiction, the nature of the relief asked must be equitable even when the suit is based on an equitable title.

Young v. *Porter*, 3 Woods., 342.
Hayward v. *Andrews*, 106 U. S., 672.
Fussel v. *Gregg*, 113 U. S., 550.
Buzard v. *Houston*, 119 U. S., 351.
Kilbourn v. *Sunderland*, 130 U. S., 505.

Here the suit is against the debtor only and the relief finally decreed to these complainants against it has no equitable characteristics whatever.

It embraces but two elements. 1. A pecuniary judgment. 2. An execution against property plainly accessible to an ordinary writ at law to enforce satisfaction. It awards merely a common law judgment and process.

No liens were enforced, no equitable fund created, fraud redressed, cloud removed, or priority declared.

If the practice adopted by the Circuit Court is to stand approved, it will result that equity courts of the United States may not only exercise concurrent jurisdiction with courts of law in the collection of mere money demands, but will moreover enjoy the advantage of entertaining suits of such creditors before their demands are due and in advance seizing all the debtor's property so as to have it in safety to satisfy the ultimate money judgment when decreed.

(3.) *The status of the creditors proving under the decree.*

All the foregoing observations, denying that the

claims of the original complainants, the Lake Superior Iron Company and the Jackson Iron Company, were within the jurisdiction of equity, apply to the other 174 claims which were reported by the master and finally decreed by the court.

The record shows that not one of these claims was due when the original bill was filed. Many did not, in fact, become due until months afterwards. They were, without exception, mere legal demands arising out of accounts, contracts and notes. In some cases the liability of appellant was direct and primary. As to nearly one-half of the aggregate indebtedness, it was secondary and wholly contingent, arising on the endorsement of the obligations of a third party. None of this secondary liability had become established when the suit was brought, because none of the paper had matured.

Some of the demands were for unliquidated sums.

The claim of the Florence Mining Company (Add. Rec., 15), filed May 29, 1883, is for damages for non-acceptance of iron ore contracted for and also on divers endorsements of the notes of J. V. Ayer's Sons, which matured in April, May and June, 1883.

The claims of the Commercial National Bank and others filed December 1, 1883 (Add. Rec., 34) shows that none of such demands had matured on February 20, 1883, and that a very considerable portion thereof were upon endorsements of paper due in February, May and June, 1883.

The claim of the Greenville National Bank filed May 9, 1883, is upon the appellant's liability as an endorser upon two notes due in March and April, 1883. (Add. Rec., 252.)

In the absence of any equity attaching to these pecuniary demands the appellant could not legally be deprived of the right of trial by jury.

Except in suits concerning testamentary assets, wherein the settled practice contemplates full administration and therefore approves an inquiry and report as to all creditors of the deceased, the rule is that only creditors whose situation entitled them to file an original bill could prove up under the decree in a judgment creditors' action. Thus it was ruled in *Parmlee* v. *Egan*, 7 Paige, 610, that when a complainant's right to set aside a sale of personal estate as fraudulent against him as a creditor, depends upon the fact that he has issued an execution which could not be levied in consequence of the pretended sale, another creditor who claims to come in under the decree must show that he has taken out an execution which could not be levied on the property for a similar reason."

Edmeston v *Lyde*, 7 Paige, 638.
Re Silas Ingraham, 2 Barb. Ch., 35.

After the satisfaction of the only judgment lien upon any of appellant's property the cause proceeded and the decree was awarded solely upon the suit of creditors at large who were parties to the original bill. Those who came in became actors in the cause by relation to the filing of the bill.

Richmond v. *Irons*, 121 U. S., 52.
Sterndale v. *Hankinson*, 1 Simons, 393.

Necessarily their coming in during the progress of the cause could not remedy the primary defect of equity jurisdiction on the original pleadings. The intervenors must in that respect share the fate of those who sought the aid of equity in a matter touching which it was forbidden to take cognizance.

In its essential character and practical results this action was nothing but a device to transfer the ordinary jurisdiction to ascertain debts, award damages and collect by execution from the common law jurisdiction where it properly belongs, to a court of Chancery. It is absolutely devoid of any ingredient of an equitable character, in prayer or final relief, and consistently with the repeated decisions of this court rightful equitable jurisdiction of the cause cannot be maintained.

Even upon the theory that the Circuit Court possessed sufficient cognizance of the cause to authorize it to award some relief, it is submitted that the orders and decree which it in fact granted are not agreeable to the received principles of equity and are wholly at variance with the settled practice of the English Chancery court, by which, under the standing orders its procedure is regulated.

II. THE COURT ERRED IN THE ORIGINAL APPOINTMENT OF A RECEIVER FOR ALL APELLANTS' ASSETS AND IN ITS REFUSAL TO DISCHARGE THE ORDER AFTER THE SATISFACTION OF THE JUDGMENT LIEN.

(1.) *The judgment creditor had adequate legal security and therefore had no equity to obtain a receiver.*

So far as relates to the equity of the plaintiff w ho held a judgment the seizure of all the corporate property was in open revolt against every principle regulating the appointment of receivers. His showing exhibited a fixed, paramount and adjudicated lien on abundant property. It is an inflexible rule that Chancery only assumes possession of property when proven facts establish a case of such imminent danger to the fund as to possibly render it inadequate to respond to the plaintiff's lien or

charge thereon. That consideration constitutes the origin and limit of the power. No claim could truthfully have been made that any danger threatened the established lien of this judgment creditor, or could in any contingency render its full payment a matter of the smallest doubt. No such claim was made. That present necessity for protecting the fund, which alone authorizes the appointment of a receiver, was wholly lacking so far as this party to the bill was concerned. To it the receivership was an unnecessary gratuity. Its judgment was a re-recorded first lien on real estate worth over two hundred times the amount. It had no right intervening the full payment thereof, to demand that the estate itself should be taken into judicial custody. If the order appointing a receiver stood on the sole bill of a judgment creditor thus circumstanced, its allowance would unquestionably be gross and inexcusable error.

(2.) *Creditors at large without lien or charge upon specific property cannot have a receiver.* This suit, after the satisfaction of the judgment, stood only on the bill and supplemental bill of creditors without judgment, execution or lien, who obtained this extraordinary relief even before their debts matured.

Such an order is contrary to every chancery precedent.

It will be instructive to consider what was the inevitable effect of the order thus granted concurrently with the filing of the bill. It ousted the possession and instantly terminated the authority of the directors and officers of the company, who under the laws of Ohio were specifically vested with the power and charged with the duty and responsibility of management, as completely as though the order of receivership had been a final judgment of ouster in a *quo warranto* proceeding.

It accomplished this also in a suit claiming no specific lien or charge on the corporate property and where there were no charges of fraud, breach of trust or improvident management and to which the officers whose statutory powers and duties were thus summarily ended were not even parties.

The order was in effect an injunction restraining the appellant from prosecuting its business or exercising any authority whatever over its property by way of enjoyment, management or alienation. Until vacated it of necessity operated as a virtual dissolution, as effectively as though obtained upon regular inquest of the state itself.

Ordinarily no court is possessed of power to affect the property of a debtor in any way until his demand has fully matured.

In Ohio legislation has somewhat enlarged the judicial power, but solely upon the ground of fraud. The statutes of that state authorize creditors holding claims not due to attach the property of the debtor when a case of accomplished or intended conveyance or removal of property to defraud creditors is established by proof. Ohio Stat., § 5564.

This enactment concerns only provisional relief in actions at law, and in no way affects or enlarges ordinary chancery remedies.

In ordinary executions and attachments the officer measures his levy so as to interfere with the debtor's possession only so far as is necessary to satisfy the liability specifically recited in his writs. He can be restrained and made liable for a palpably excessive and oppressive levy. Here the seizure under the court's order was comprehensive.

On the footing of such equity as is discernible in the application of two creditors holding ordinary promissory notes for about $30,000, the entire corporate assets inventoried at over $2,000,000 in value, was taken into judicial custody before any debt had even become due and in the absence of any fraud or waste.

The State of Ohio has not enacted any statute authorizing such a procedure in the local courts. The principles and maxims of inherent equity jurisdiction must be relied on to furnish warrant for such an unnecessary and unprecedented exercise of judicial power. On general principles no receiver can be placed over property unless the plainitff has some specific lien or charge thereon. His status as a mere creditor will not suffice.

Evidently the view which underlies the receivership order is, that at the suit of creditors holding unmatured obligations, chancery can not only interfere with the debtor's control over his property by injunction, but through a receivership can properly seize all his estate and hold it in safety until the debts mature and can be adjudged and enforced.

Efforts have been frequently made to establish the authority of equity courts on the application of ordinary creditors before judgment, to interfere with their debtors' possession and dominion over his property and preserve it as a fund for the ultimate satisfaction of their debts.

These actions usually averred the pendency of a suit at law, and that the debtor was fraudulently attempting to convey or conceal his property to intercept and avoid the final writ.

Differing altogether from this record, the jurisdiction of equity was in such cases sought to be established

upon the ground that it was in aid of the pending suit at law and that to relieve against fraud the powers of a court of equity could always be invoked.

In numerous such contentions the courts have uniformly denied the existence of any such dangerous judicial power over private property.

The question is discussed and authorities gathered in

Bigelow v. *Andrews*, 31 Ill., 322.
Rich v. *Levy*, 16 Md., 74.
Parmly v. *Bank*, 3 Edw., Ch. 395.
Holdrege v. *Gwyness*, 3 C. E. Green, 26.
Mills v. *N. Ry. of Buenos Ayers*, 5 Ch. App., 627.
Wiggins v. *Armstrong*, 2 Johns., Ch. 144.

The unanswerable reasons which forbid the cognizance of such causes is well stated in

Uhl v. *Dillon*, 10 Md., 500.

This was a bill for an injunction and receiver filed by a creditor holding an open account, alleging that defendant was largely indebted for his stock in trade; that he was disposing of his stock, had sold his real estate, and was collecting debts due him, with intent to defraud his creditors; that he intended to abscond to parts unknown for the purpose of hindering, delaying and defrauding his creditors. An injunction having been granted and a receiver appointed by the court below, on appeal the decree was reversed and bill dismissed. The court, BARTOL, J., says:

"The bill filed by the appellees in this cause states no "sufficient case entitling them to the relief prayed. No "authority has been shown to this court, nor can "any be produced, entitled to consideration, which

"sanctions the exercise of the high and extraordi-
"nary power of a court of chancery to interpose
"by writ of injunction, in a case like the one before
"us, restraining a debtor in the enjoyment and
"power of disposition of his property. The appel-
"lees are merely general creditors of the appellant, who
"have not prosecuted their claim to judgment and exe-
"cution, nor in any other manner acquired a lien upon the
"debtor's property, and were not entitled to the writ of
"injunction nor to the appointment of a receiver. What-
"ever may be the supposed defects of the existing laws
"of the state, in leaving to the debtor the absolute power
"of disposing of his property and leaving the creditor to
"the slow and very inadequate legal remedies now pro-
"vided, if such defects exist, it is solely in the power of
"legislature to correct them. It is not within the prov-
"ince of the chancery courts to stretch their power be-
"yond the limits of the authorities of the law, for the
"purpose of remedying such defects. Such a course
"would be productive of great mischief, and make the
"rights of the citizen depend upon the vague and uncer-
"tain discretion of the judges, instead of the safe and
"well defined rules of law."

The doctrine of these cases has received the full approval of this court in *Adler* v. *Fenton*, 24 How., 411. It is there decided:

"The authorities are clear, that chancery will not in-
"terfere to prevent an insolvent debtor from alienating
"his property to avoid an existing or prospective debt,
"even when there is a suit pending to establish it. In
"*Moran* v. *Dawes*, Hopkins' Ch. R., 365, the court says:
"Our laws determine with accuracy the time and manner
"in which the property of a debtor ceases to be subject

"to his disposition and becomes subject to the rights of "his creditor. A creditor acquires a lien upon the lands "of his debtor by a judgment and upon the personal "goods of the debtor, by the delivery of an execution to "the sheriff. It is only by these liens that a creditor has "any vested or specific right to the property of his "debtor. Before these liens are acquired, the debtor has "full dominion over his property; he may covert one "species of property into another and he may alienate "to a purchaser. The rights of a debtor and those of "a creditor, are thus defined by positive rules; and the "points at which the power of the debtor ceases, and "the rights of the creditor commences, are clearly estab-"lished. These regulations cannot be contravened or "varied by any interposition of equity."

(3.) *The grounds on which the receivership was granted were inadequate.*

One of the reasons assigned for granting a receivership was the insolvency of the defendant. The authorities just cited hold that insolvency, even produced by the fraud of the debtor, does not entitle the creditor to a receiver. The law of Ohio does not even recognize the debtors insolvency as a ground for ordinary attachment proceedings.

Taking into account the magnitude of the property interest seized upon herein the character of the averments is singularly vague and inadequate.

Bankruptcy laws and winding up statutes always define with precision what constitute acts of insolvency. In equity the phrase "insolvency" has no settled meaning. It may signify that the debtor has no property whatever subject to execution, or that he has failed to meet his

commercial paper as it matured in usual course or that he had suspended active business, or that on a full settlement of his affairs the liabilities would exceed the assets.

It cannot be gathered from the averments here that the appellant had any past due paper which was unpaid, or had committed any act of insolvency whatever. The decree and master's report fully demonstrate that when the receiver was appointed, except the small judgment stated in the bill, the corporation owed no past due debts, was free of all judgments, and owned a large property.

There was no suspension of business. On the contrary the bill states that this alleged insolvent was even then employing 4,000 operatives and had a good-will and business of great value.

The only theory, therefore, upon which the charge of insolvency can be justified must be that on final adjustment its assets would not pay its debts. Obviously that would not be the declaration of an ascertained and existing fact, because none of the debts were then due or enforcible, but only an opinion as to a future event, presenting a case of anticipated instead of existing insolvency and dependent on a multitude of contingencies. The pleading does not state even approximately what the debts are or the value of the assets. Neither does the verification or the affidavit in support show that the deponent was in any condition to obtain reliable information on that subject. The meaning of the word "insolvency" in the statute providing for the priority of claims due the United States, has been adjudged to be a legal and known insolvency manifested by some notorious act of the debtor, and not a mere inability to pay.

Prince v. *Bartlett*, 8 Cranch., 434.
Conrad v. *Ins. Co.*, 1 Peters, 438.

The mere opinion of witnesses as to the insolvency of a corporation, without stating the facts on which the opinions are founded, are not evidence sufficient to authorize judicial action.

Brundred v. *Mac. Co.*, 3 Greens, Ch. 294.

The other reason advanced justifies strong observation. The averment is that vexatious litigation accompanied with attachment and seizure had been commenced and others were threatened, and that such proceedings would "give to those creditors who were pursuing them undue "and unfair advantage and priority over the complainants, "whose claims are not yet due and make them irrepar-"able injury and damage."

No particulars whatever were given, either on the pleading or otherwise, as to what creditors were thus instituting vexatious litigation or the amount of their claims or what property they had seized, nor were such wrong doers made defendants.

Considering that one of the very complainants making this outcry against unfair advantage and priority had on that very day taken a judgment and claimed for itself an indisputable first lien on all the appellants real estate as against all other corporate creditors, the petition for chancery aid in order to secure equality of distribution of the fund was obviously trifling and insincere.

Taking the averment as it is, it was a most extraordinary and oppressive exercise of judicial power to sequester the entire property of a debtor upon the complaint of one set of creditors, on a vague charge that other creditors had seized some of its property on litigations which were "vexatious." The proposition has neither logic or equity.

If, on the other view, the litigations were properly instituted and sustainable, the sole effect of the receivership would be to use a court of Chancery for the avowed purpose of intercepting the legal remedies thus first put in motion and prostitute the extraordinary writ of equity to hinder and defeat creditors in the exercise of their lawful rights.

Rightly interpreted, this is what was evidently designed by the bill and the receivership. It was to place all the property beyond the reach of legal process and remedies; to give the court the custody of the property, because in its hands it was no longer the subject of levy or attachment.

Equity recognizes the doctrine of diligence. It not only sustains legal priorities properly acquired, but creates equitable preferences of its own in favor of the vigilant creditor.

To inaugurate a receivership of a debtors entire property at the suit of creditors who held unmatured debts for the avowed purpose of actively preventing other creditors from obtaining a legal priority, is a doctrine which is unprecedented and revolutionary.

It is, in substance, an injunction to render ineffectual the legal remedy to which the creditor has an absolute right to resort.

III. THE ORDER TAKING THE SUPPLEMENTAL BILL AS CONFESSED AND PROCEEDING TO DECREE THEREON, WAS ERROR.

The standing rules require the complainant to procure leave of court, on good cause shown and notice to the

other party, before he can file a supplemental bill. This only enforces the settled practice.

Kennedy v. *Bank*, 8 How., 586.
Urime v. *Albert*, 2 Md. Ch., 42.
Story Eq. Pl., § 333.

It is quite important to note that the scope of the original bill was purely protective. It claimed no lien, prayed for no ascertainment of debt, or sale of property, or ultimate relief whatever. It contemplated nothing except an *interim* judicial management to preserve the plant as an entirety and prevent the stoppage of its existing business.

The whole theory of the case was changed on the presentation of the supplement. The court was asked by it to convert the cause into one for the general administration of assets, to issue notice to all creditors, ascertain the debts, sell the property and make distribution.

It was this pleading which constituted the real basis for the inquiry in the master's office and the final decree.

It becomes important for such reason, to ascertain whether this pleading which radically affected the result was filed in such manner that the defendant below was in court to answer its exigency. Equity Rule 57, requires that a supplemental bill shall be filed on leave of court "upon proper cause shown and due notice to the other "party."

This was filed without leave in contravention of the rules; no notice was ever given to appellant and no rule taken against it to plead thereto.

Shaw v. *Bill*, 95 U. S., 10.

The notice for leave to file, or the service of the rule to plead, stand in the nature of process.

In absence of all notice, appellant was not in court, so far as this pleading was concerned, and it was improper practice to take the order *pro confesso* and proceed to decree in accordance with the prayer of a bill of supplement so filed, and which so completely altered the whole structure and scope of the suit.

Chapman v. *Barney*, 129 U. S., 677.
Wash. R. R. v. *Bradley*, 10 Wall., 303.
Terry v. *McClure*, 103 U. S., 442.

When a complainant relies on a decree *pro confesso* he should be held to a strict compliance with the equity rules and a material non-observance on his part will avoid his decree.

IV. THE ORDER OF ADMINISTRATION ENTERED APRIL 23, 1883, REQUIRING ALL CREDITORS TO FILE THEIR CLAIMS IN COURT WAS PREMATURE AND ERRONEOUS.

This order necessarily imports a jurisdiction already perfected in the cause to adjudge the claims of all creditors and satisfy them out of a fund. The petitions lodged under this order were considered by the special master and made the foundation of the decree. The original bill was filed February 20, 1883. As noted on the subpœna shown in Add. Rec., 6; the defendant's rule day for answer was on May 7.

The irregular *pro confesso* order was not entered until June 14, 1883.

The order for creditors to file claims and share in the fund was entered April 23, 1883. The only prayer for such judicial action was in the supplemental bill. Thus the court proceeded to decree in accordance with the prayer of the supplemental bill and assume rightful

cognizance of the claims of all creditors not only before any hearing or decree against appellant, or any default, but even before an answer was due from it under the rules.

Until decree is passed in favor of the original complainants on the equity of their pleadings it is strictly a suit between party and party. The plaintiff is *dominus litis*, and may amend or dismiss. The defendant is at liberty until inchoate rights of other creditors in like relation have become fixed by decree after hearing, to pay off the plaintiff's claims and demand dismissal.

The unnamed creditors only come in after and prove up "under the decree."

For the court, without hearing or decree and even before answer was due from the defendant, to enter an order converting the cause into a general administration suit, was contrary to established practice and in every way irregular.

V. THE PLEADINGS ARE NOT SUFFICIENT TO SUPPORT THE DECREE AS RENDERED.

The rules of sound pleading require that the plaintiff should present a clear statement, showing the nature of the equity for which he requires relief. Daniell says: "An original bill in chancery is in the nature of a declar-"ation at common law." The final decree gave judgments *in personam* against appellant in favor of the two original plaintiffs holding promissory notes for their whole demands.

When the supplemental bill was filed March 28, 1883, some of their notes had not then matured. No later pleading was filed. Under such a condition of the record

the personal decree for the whole debt had no pleading to sustain it.

Neither the original or supplemental bill, either in the text or by exhibit, furnished the court with any description of the real estate which the decree ordered to be sold.

No decree for the sale of specific property can be sustained, unless it is identified in some way in the pleading, or an exhibit filed therewith. This is in accord with the axiom in the equity law of procedure that the allegations and proofs must agree, and that proofs without averments are unavailing. If the decree is designed to operate directly upon specific property, the subject-matter to be affected must be properly identified in the pleading.

Chapman v. *Hunt*, 1 McCarter., 149.
Ryns v. *Ryns*, 3 Vesey, 343.
Braithwaite's Pr., 233.

The reason of such requirement is not only to properly inform the defendant of the precise nature of the equity he has to meet but to describe the property in controversy so that third parties intermeddle at their peril.

Bennett's Lis. Pen., 153.
Griffith v. *Griffith*, 1 Hoff. Ch., 153.

This rule has been specially enforced in case of the foreclosure of a mortgage.

McGee v. *Smith*, 1 C. E. Green, 462.

This court in *Miller* v. *Sherry*, 2 Wall., 237, decided that a judgment creditor's bill did not constitute a *lis pendens*, for want of a specific description.

"To have that effect, a bill must be so definite in the "description that any one reading it, can learn thereby "what property is intended to be made the subject of "litigation."

As there was no issue tendered by any pleading as to the ownership of any specific real estate the decree in that respect has no basis on which to stand.

It is required by the twenty-first equity rule, that "the "prayer of the bill shall ask the special relief to which the "plaintiff supposes himself entitled," etc.

Its due enforcement requires that the decree must conform to the scope and object of the prayer and cannot go beyond them.

Washing. R. R. v. *Bradley*, 10 Wall., 303.

The only special relief asked in the original bill, was that the court should appoint a receiver.

The evident scope of the suit did not contemplate either a decree for the plaintiff's debts or the audit of all creditors' claims or the sale of any property.

It has been already insisted that appellant was not in court as to the supplemental bill, because it was filed without leave or notice, and no rule taken to plead thereto.

The final decree must therefore be tested solely by the scope and object of the prayer of the original bill, and as that did not contemplate or ask for any money decree or the sale of any property, the ultimate relief granted as to both such matters ought not to stand.

Page v. *Clinton*, 12 Vesey, 48.
Chalmers v. *Chambers*, 6 H. & J., 29.
Langdon v. *Godard*, 2 Story, 267.

Notwithstanding the order *pro confesso*, this objection is available on appeal, because even after default the rules restrict the relief to what is proper to be decreed under such pleadings as are properly on file and the proofs in the record.

Thompson v. *Wooster*, 114 U. S., 113.
Clark v. *Reyburn*, 8 Wall., 318.
McCallister v. *Kuhn*, 96 U. S., 87.
Slacum v. *Pomeroy*, 6 Cranch, 221.

VI. THE PROCEEDINGS IN THE MASTER'S OFFICE WERE NOT CONDUCTED ACCORDING TO PROPER PRACTICE. HIS REPORT SHOWS THAT IT WAS BASED ON INCOMPETENT PROOF TAKEN WITHOUT NOTICE.

The predicate for the order directing the master to state the demands of all creditors was the order of April 23, 1883, requiring them to file their claims in court.

The order *pro confesso* so far as relates to the original bill, was of no practical effect. There were no substantive facts alleged therein, the truth of which being admitted in any way aided the court to settle the principle or frame the details of the decree.

That, except as to the description of the real estate, is based on the master's report, while that is in legal effect based wholly on the supplemental bill which, if the former contention be sound, can not be regarded.

While the record shows that appellant was not in court to the bill of supplement, the court entered the default thereon. Evidently both court and master proceeded thereafter on the theory that the cause should be heard strictly *ex parte*. The English equity practice, notwithstanding the defendant's default, recognizes his right to attend the taking of the account, and "it is necessary to serve him "with warrants upon all proceedings in the master's office "by which his interests are in any way affected."

2 Daniells Ch. Pr., 1,175.

Rule 18 only says that "the matter of the bill" shall be decreed *ex parte*.

Evidently it was not designed to preclude the defendant on any matters of fact not stated in the bill and thus covered by the admission implied by non-answer, or to prevent him from being heard in the master's office to contest the claims of unnamed creditors who attempted to prove under the decree.

The appellant could not therefore be lawfully deprived of its right to a day in court as to each of such petitions and a decree entered *ex parte* on the report of a master, who also heard evidence and adjudged the matters without notice, is as much a nullity as a common law judgment would be when no process had been served on the defendant.

Of the 177 claims reported by the master and decreed by the court, only two were included in the main pleadings on which appellant's default was taken. The amount in gross awarded to those who came in under decree was nearly $1.300,000, embracing not only direct and liquidated demands, but collateral, contingent, unascertained and contested liabilities and many of these claims not even filed in court until long after the *pro confesso* order was taken. That the debtor had the right to notice before it could be convicted of record of debts of such number and magnitude, does not require argument.

The appellant's contention is that it was entitled to attend upon the hearing of all such new and independent demands and that the master's report and decree of court obtained by the denial of that right cannot be valid.

The seventy-fifth equity rule requires the master to give due notice of proceedings under the reference to

each of the parties or their solicitors. The master is only allowed to proceed *ex parte* on the failure of the party to attend after such service.

Each one of these interventions was in contemplation of law a separate controversy, presenting a new issue not in any way included in or adjudged by the default.

" Where the court directs inquiry into a fact it is in the nature of a new issue joined."

Smith v. *Althers*, 11 Vesey, 564.

By the primary decree, in an ordinary creditor's suit, whether taken on the order for want of answer, or after full hearing, the court adjudges nothing except that a case is made calling for an administration of assets. It establishes the general right of the class, but adjudges neither the validity or amount of any specific claim. It is upon the basis of this decree that creditors other than the plaintiffs of record are allowed to subsequently present and by new testimony prove up their respective claims and thus obtain the benefit of the decree.

Gal. R. R. v. *Cowdrey*, 11 Wall., 479.

Certainly it requires but the mere statement of the proposition to establish that a predicate decree thus entered by default can not in any way impair the debtor's right to have opportunity to be fully heard upon the claims of other creditors.

To establish their right to share in the fund raised by the decree each creditor must present his claims by petition detailing the particulars of the case.

This pleading is treated like an original bill or a declaration at common law. It must be established by competent evidence. The party owning the estate against which

the claim is asserted thus has the benefit on hearing, of any defense which would be available if the creditor had brought an original action for his debt.

Richmond v. *Irons*, 121 U. S., 53.

Story designates them as "adversary suits"

Eq. Jur., § 548.

The petitions of creditors being thus dealt with as *quasi* separate litigations, chancery uniformly requires that the debtor shall be served with a notice of filing, which, under the English practice, is designated "a warrant on leaving."

2 Danlls. Ch. Pr., 1209.

This notice is the equivalent of original process and is indispensable to give the master any power to ascertain or vest any jurisdiction in the court to adjudge a recovery.

As the failure to answer the bill, confessed nothing except such facts alleged therein, as were well pleaded, it can not be rightly held that the master and court had the power to proceed *ex parte* to entertain the applications of creditors other than the original complainants and ascertain and decree thereon without any notice or opportunity of challenge or cross-examination. Such a proceeding is an arbitrary edict, not a judicial sentence.

Winsor v. *McVeigh*, 93 U. S., 274.

U. S. v. *Walker*, 109 U. S., 258.

Not only was the appellant entitled to this original and jurisdictional notice of the filing of such claims, but according to the standing orders and the correct practice, the master had no right to proceed to a hearing on these claims, except on full notice given by him to appellant of such hearing. A report thus reached, wholly *ex parte*

is a nullity and should be disregarded as much as a judgment without process. If the appellant had the right notwithstanding the default on another pleading to attend the proceedings before the master on the hearing of these petitions, then the requirement of the seventy-fifth equity rule was mandatory and cannot in any case be disobeyed by the master. It requires a time and place to be assigned to hear the matters standing on reference before him, and "to give due notice thereof to each of "the parties or their solicitors."

No notice of filing these creditor's claims or any of them appears in the record, and there is no recital of the existence of any such notice in any decretal order or in the master's report or the decree.

To sustain a decree or judgment taken by default, it is essential that the record should affirmatively show the existence of jurisdiction by embodying the process and service or some recital thereof as an equivalent.

The master's report does not recite any attendance of appellant or any service of notice of hearing which alone could authorize him under the rule to proceed. (Rec., 34.) The settled practice requires that the report of the master should show on its face that all parties entitled to attend had been duly summoned.

Hulbert v. *McKay*, 8 Paige., 652.
Franklin v. *Van Cott*, 11 Paige, 129.

After the entry of default for want of answer the cause was in fact conducted both in court and in the master's office upon the view that the subsequent conduct of the cause was to be strictly *ex parte*, and that appellant had no right to appear or be heard on any matter whatever.

"No decree bindeth any person who was not served

"with process *ad audiendum judicium* according to the "course of the court, or did appear in person in court."

Bac. Ord. 11.

It also plainly appears upon the face of the master's report that, except in a few instances where the receiver (who was not vested with any such power by the order of appointment) contested the amount of the claim, the finding was based upon the verified petition of the creditor. (Rec., 34, 35.)

The master erroneously designates the verified claims of creditors as "proofs filed by the petitioners," and received them as plenary proof of the debt.

For three reasons this was irregular:

First. The only purpose of the verification at the foot of such claims is to furnish a protection to the court against fictitious claims. It is a mere affidavit of merits.

Bennett's Office of Master, 54.

Such oaths have never been competent to prove the claim.

Bacon's Ordinance, 75, declares: "No affidavit shall "be taken or admitted by any master of the chancery "tending to the proof or disproof of the title or matter "in question, or touching the merits of the cause."

The leading text writer on equity practice says: "Such "affidavit, however, is not intended as evidence to the "master in proof of the debt, and must not be used by "him as such."

2 Dan. Ch. Pr., 1,209.

The claims must be proven by competent testimony *aliunde*.

St. Bank v. *Bell*, 3 Halst. Ch., 376.
Crane v. *Bingham*, 3 Stockt., 33.

"The master cannot proceed upon any inquiry before "him by affidavit without the consent of all parties, for "this reason: that the proceeding by affidavit does not "afford the opportunity of cross-examination."

Morris v. *Mowatt*, 4 Paige, 142.
Rowley v. *Adams*, 1 Mylne & Keen, 543.
Brown Ch. Pr., 825.

Second. The record, by specific entries and stipulation shows that these creditors' claims were not verified before such an officer as to be receivable in courts of the United States as documents under oath.

The petitions of the Commercial National Bank and others (Rec., 19), Rossie Iron Works (Ad. Rec., 13), Florence Mining Company (Ad. Rec., 17) and Greenville National Bank (Ad. Rec., 253) are all sworn to before a notary public.

By stipulation (Ad. Rec., 1) the latter petition is to be taken as typical of the petitions of all creditors' petitions not otherwise in the record.

As the decisions of this court have settled that notaries public have no power under the acts of Congress to administer oaths or certify affidavits in judicial proceedings in the courts of the United States, it conclusively appears that the master's report was not only taken without notice, but is based exclusively upon unsworn petitions, without hearing any competent testimony whatever.

U. S. v. *Curtis*, 107 U. S., 67.
U. S. v. *Hall*, 131 U. S., 50.

Third. It has been previously stated that many of these claims rested entirely upon the contingent liability of appellant as endorser on paper maturing after suit brought. The claim of the Greenville National Bank is a represent-

ative of such class. This claim was allowed by the master as No. 6 in the schedule. His report avers in substance that he bases such allowance on the creditors' petition. This appears in full. (Ad. Rec., 253.) If this petition was filed as a declaration it would not disclose any cause of action, because it wholly fails to aver that appellant had any notice of non-payment or protest of these notes. The statutes of Ohio have enacted the rules of the law merchant as to the conditions precedent necessary to fix the liability of an endorser. By Rev. Stat., § 3,176, the right of action is not complete until demand and notice of non-payment.

McGruder v. *Bank*, 3 Peters, 87.

The failure to give notice is tantamount to payment. According to Chitty, the averment as to notice is of the essence of recovery and so material that its omission is fatal, even after verdict.

Chitty on Bills, 576.

Slacum v. *Pomeroy*, 6 Cranch., 221, is decisive. This court ordered a judgment against an endorser to be arrested solely because the declaration failed to aver notice, even though the objection was not made below.

There is no testimony in the record or recited in the master's report which tends in the slightest degree to establish either the alleged demand of payment, or the non-alleged notice to the endorser.

Necessarily, such dishonor and notice could not be shown by any books or papers of appellant, as the non-payment did not occur until after suit.

The allowance therefore, of this secondary liability accruing if at all, pending the suit, is based solely upon the

unsupported petition of the creditor which is not lawfully verified and does not even aver the necessary facts to state a cause of action. This fatal objection to any recovery upon the endorsed paper applies to twenty-four claims, being Nos. 6, 13, 36, 54, 59, 71, 74, 87, 90, 93, 97, 99, 101, 102, 106, 111, 113, 114, 116, 166, 168, 169, 172 and 175, of the schedules, aggregating over $500,000.

The view taken by the Circuit Court that the effect of the order *pro confesso*, was to wholly exclude appellant from any participation in the cause thereafter, must be considered grossly inequitable and oppressive when the record shows that the court awarded allowances amounting to over $400,000 on sixty-two claims which were not even on file when the default was entered on June 14, 1883, and which were decreed without notice or proper testimony.

VII. THE FINAL DECREE IS IN MANY MATERIAL RESPECTS ERRONEOUS AND FATALLY DEFECTIVE.

(1.) *The decree is not justified by the pleadings and prayer for relief.*

This point has already been somewhat discussed. The contention of appellant is, that as there was no leave given by the court to file the supplemental bill and no notice given thereof or order entered to plead thereto, the equity rules did not permit appellant to be defaulted thereon.

If this view is correct, this court must on appeal, reject that pleading altogether and the decree must be considered solely with reference to the original bill.

It will probably not be seriously contended that a final

decree granting pecuniary recoveries *in personam* to a large amount, in favor of many creditors, and an order for the sale of specific real estate to satisfy such judgments, can be properly obtainable on a default taken on a bill which identifies no property whatever, claims no specific lien, mentions no other creditors by name, asks for no money recovery or administration or distribution of assets.

Even if the bill of supplement should be considered as properly in the record, its averments not containing any description of real estate or claim of specific lien, would not suffice to authorize the entry of the decree now under review. Other pleadings or receivers reports or proofs cannot supply this defect in pleading or constitute a foundation for relief. Every bill must contain in itself sufficient matters of fact *per se* to maintain the case of the plaintiff so that the same may be put in issue by the answer and established by the proofs; if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision.

Harrison v. *Story*, 9 Peters, 502.
Berne v. *Chiles*, 10 Peters, 207.

(2.) *The proofs do not support the Decree.*

Under Sec. 698, Rev. Stat. U. S., the burden is on the successful suitor to see that all the evidence, oral, documentary and by deposition, which is necessary to support the decree, shall be included in the record so that on appeal this court shall have before it all the facts upon which the lower court acted.

Conn. v. *Penn.*, 5 Wheat., 424.

The decree must be affirmed or reversed upon the proofs sent up with the record.

Blease v. *Garlington*, 92 U. S., 1.

The only proofs in the record on which the decree must rest, consist: 1, of such facts well averred in the original bill as were admitted by the failure to answer; 2, the master's report.

Considering the utterly vague character of the original bill, it does not of itself furnish any basis for decree.

That the master's report was irregularly taken without either adequate or competent testimony or notice has been already discussed.

Neither the bill or supplement or the master's report contain any reference to or description of the specific real estate which the decree ordered to be sold, either by definite or vague recital or reference to any exhibit or conveyance.

In decreeing its sale the court proceeded without any competent proof whatever to authorize its action.

(3.) *The money judgments for nearly $1,300,000 awarded to incoming creditors were taken without proper pleadings, notice or proof.*

If the supplemental bill is rejected as not a legitimate pleading against appellant, the case stood solely upon a bill which did not state a case or pray for either the ascertainment of creditor's debts or the distribution of assets.

The objection to the *ex parte* manner in which these large recoveries were secured has been already discussed in connection with the master's report.

The petitions on the endorsed paper are not sufficient in law to sustain any decree for such claims.

(4.) *The decree illegally required the appellant to pay compound interest in order to save its property from sale.*

The master's report shows on its face that the allowances included interest from the maturity of each claim up to June 1, 1884. (Rec., 35.) The final decree of February 23, 1886, gave judgment for these full allowances as reported, together with interest at six per cent. per annum on such gross sums from June 1, 1884. (Rec., 38.)

These large recoveries, thus including interest on interest, the appellant was ordered to pay within five days, from the entry of decree, or in default its property was to be sold.

At an early period the English chancery practice, where a mortgagor came to redeem and at his inquiry a report was made computing what was then due for principal, interest and cost, and he thereupon asked for an enlargement of the period for redemption, the full amount fixed by the master was, according to Lord Harwicke, to be considered as "one accumulated consolidated sum" on which fresh interest was to be cast.

Even this exceptional rule has long since been abandoned and it is now the universal rule, both in England and this court, that final decrees can only embrace simple interest on the principal debt.

2 Story Eq. Jur., 1277.
Whatton v. *Craddock*, 1 Keen, 26.
Van Benshoten v. *Lawson*, 6 Johns. Ch., 313.
Dunshur v. *Parmelee*, 19 Vt., 172.
Reed v. *Reed*, 10 Pick., 400.
2 Daniel Ch. Pr., 1259.

The Court of Appeals in Kentucky have ruled that compound interest is iniquitous and will not be decreed in chancery though agreed to by the parties.

Breckenridge v. *Brooks*, 2 A. K. Marsh, 335.

Compound interest is not recoverable except on a new agreement made on adequate consideration after interest has become due.

The settled doctrine seems to be that rests are never allowed in calculating interest in equity causes except in case of misconduct in those occupying fiduciary positions.

It appears by the current report of the receiver that up to December 31, 1885, the net profit in his hands resulting from the operations of the plant after his appointment, was $352,244.29. (Rec., 37, 38.)

If the creditors lawfully seized this property, their possession through the receiver was closely analogous to the position of a mortgagee having entered for condition broken. Adopting the rule which controls the statement of the account in such cases, the net rents and profits realized after entry must be credited to the debtor before the decree goes.

The creditor in possession is thus treated as the bailiff of the debtor and accountable for actual rents.

Onderdonk v. *Gray*, 4 C. E. Green, 65.
Buckman v. *Astor*, 9 Paige, 517.

The principal of the allowed debt is $1,235,819.40, on which the annual interest is a trifle over $74,000.

The net gain reported by the receiver from February 20, 1883, to December 31, 1885, as $352,244.29, shows a net income or profit of over $120,000 a year.

When the actual produce of the estate in *custodia legis* was, therefore, nearly double the accruing interest on the whole allowed debt, to exclude that wholly from the account and allow even ordinary interest to swell the debt would be an oppressive decree.

The requirement of the court that the payment of this large sum adjudged *ex parte* and augmented by compounding interest should be paid in full in five days to prevent a sale, is a palpably illegal exaction imposed as a condition precedent for preserving the rights of the owner in its estate and if executed would result in wrongfully depriving it thereof.

C. D. & V. R. R. v. *Fosdick*, 106 U. S., 71.

(5.) *The decree improperly directed the sale in one parcel of real estate and personal property.*

The appellant is a private corporation. Its property is not devoted to any use of a public character. The property of railway corporations is considered as appurtenant to the franchise, to own and operate a public highway which must necessarily be dealt with by the courts as a unit. For this reason its property essential to the maintenance of its public function is not subject to an execution at law. That rule has no application here.

The decree (Rec., 50) required all the property described in the decree to be sold as upon a judgment at law and "in one parcel, without division."

The described property consisted of real estate in Ohio, shares of stock in another corporation, interest in a partnership, leases in Pennsylvania coal lands, right to dig and remove sand and gravel from certain premises, and "tools, implements, loco-

"motives, cars, railway track and appliances, office "furniture and fixtures, patterns, duplicate rolls, castings, "lumber and other personal property belonging or per- "taining to the said real estate and used in connection "therewith, or in carrying on the business of manufactur- "ing," etc.

According to the laws of Ohio there is no such thing as an execution sale of real and personal property in one parcel.

Real estate is not salable under execution at all until the debtors' whole personal estate is exhausted.

The officer to whom the writ is issued must first levy the same upon the goods and chattels of the debtor, which failing, he must endorse upon the writ the words "no "goods," and forthwith levy the same upon the debtor's lands and tenements.

Rev. Stat. Ohio, § 5383.

Lands levied on must be appraised on actual view by three disinterested freeholders who are residents of the county where the lands are situate, and cannot be sold for less than two-thirds such appraisal. Secs. 5389, 5391.

Personal property is not subject to appraisal, at all.

Sec. 5398 requires confirmation by the court on execution sales of land. In sales of personal property under execution, the title passes on payment of the bid without confirmation. It is impossible to execute the appraisement laws of Ohio as to chattels real in Pennsylvania. It is for these reasons unlawful and impracticable to appraise and sell this real estate and personal property together in one parcel "as upon a judgment at law," under the statutes of Ohio, and in that respect the decree was irregular.

(6.) *Contrary to settled equity practice and also to the Ohio statutes, the decree erroneously ordered the sale of appellant's real estate before its personal property was exhausted.*

The decree specifically excepts from sale all "the material and supplies and products manufactured or in process of manufacture." It also fails to apply by credit on the decree or otherwise any of the cash and choses in action of appellant in the receiver's hands before resort to the land.

The receiver's report of December 31, 1885, less than two months before the decree, shows that the leviable personalty on hand of the kind excepted from its operations amounted to $430,814.97. Including with that, the cash and available credits, there were gross personal assets of $754,793.17. After paying all receivership liabilities, there was shown net personal assets over and above the plant, of $530,297.64. (Rec., 37, 38.)

If this proceeding is to be dealt with on the footing of a creditor's suit, then the decree is framed in explicit contradiction to the settled rules which govern the administration of assets in such cases.

It is a rule, absolutely without exception, where a fund is raised out of a court of chancery, or applied by it, for the payment of creditors, that the personal estate is the primary fund for the satisfaction of debts and that a decree is subject to reversal which directs the sale of real estate before the debtor's personal property has been fully applied and the deficiency ascertained.

Thompson v. *Brown*, 4 Johns' Ch., 619.
McKay v. *Greir*, 3 Johns' Ch., 56.

That the realty is only an auxiliary resort is held to be

true, even when there is a charge upon the land by way of mortgage or legacy, unless there be an explicit exoneration of the personalty.

1 Story Eq. Jur., §§ 571, 573.
Hose v. *VanHosen*, 1 Comst., 120.
Bank v. *Beverly*, 1 How., 134.
Fenwick v. *Chapman*, 9 Peters, 461.

As has been before shown this general doctrine of equity has been incorporated into the statute law of Ohio. In absence of an express lien by law or contract upon specific real estate of the debtor, the creditor is restricted in seeking to enforce satisfaction, to the personal estate. The lands of the debtor, by the plain words of the statute, are absolutely exempt from levy and sale until all the personalty has been exhausted.

Rev. Stat., Sec. 5,383.

This long-existing legislation of the state constitutes a rule of property for the debtor's benefit which cannot be disregarded by the Federal court.

Mason v. *Ins. Co.*, 106 U. S., 163.
Brine v. *Ins. Co.*, 96 U. S., 627.

It has given the creditor no specific charge on its property; the debtor has the absolute right under the statute to have its property sold in the order fixed by law. The court cannot deprive it of this vested and important privilege.

Without question this statute applies to and controls executions issued on ordinary judgments at law recovered in the Circuit Court. It should equally apply when the only relief on these legal demands was precisely such a recovery as would have been given at law.

When an equity court decrees a mere pecuniary recovery, as in this case, the equity rules declare that it is to be collected by execution, as in an action of assumpsit. When chancery deals with rights strictly legal, it adopts and enforces legal analogies.

To declare as this decree does that these mere pecuniary recoveries should be collected as "on a judgment at law," and then order the sale of specific real estate as a primary fund when the records and files exhibited a personalty fund of over $750,000 is plainly contrary to usual equity practice and the letter and spirit of a controlling statute. It deprived appellant of a substantial and positive right founded on a valid statute.

(7.) *Consistently with equity practice the Circuit Court had no power to decree the sale of any specific property whatever in this cause.*

It is elementary doctrine that courts of equity act *in personam*. They can only deal directly with property when they are called upon to enforce some specific lien or charge imposed thereon by the act of the party or the law and because the limited nature of the final process issued out of the courts of common law prevent them from furnishing any relief appropriate to such suits.

In the two instances where courts of equity entertain the suits of creditors who seek no relief except the payment of legal demands, it is to be particularly noted that the jurisdiction does not rest upon similar grounds and the nature of the relief granted is altogether different.

The second group as stated in *Jones* v. *Green* is where a judgment creditor having his execution returned unsatisfied applies in equity to reach and apply the debtor's

assets which are not subject to execution and therefore accessible only by the aid of chancery.

In such cases the filing of the bill creates a lien upon the equitable assets sought to be reached, in the nature of a seizure under a writ of *fi. fa.* It constitutes an equitable levy upon such property as is identified in the bill. The enforcement of this lien on such property is the vital principle of the jurisdiction and if the plaintiff prevails, the only decree which can be passed consistently therewith is one dealing directly with the specific assets thus subjected to equitable levy and by sale or otherwise securing their appropriation to the debt.

3 Pomeroy Eq. Jur., 1,414.

This litigation is not of that class, not only because the creditors have neither judgment or returned execution, but also for the reason that the filing of the bill herein did not and could not create any lien whatever upon the property ordered to be sold, as it was all subject to execution at law and for that reason not primarily subject to chancery process at all.

The other instance when equity will aid the creditor to collect his debt is where the property sought to be affected is subject to levy, but there has been some fraudulent act of the debtor which obstructs and clouds the execution of the process against it.

In such cases the court of Chancery never decrees the sale of the property sought to be subjected.

As its juridiction is strictly auxiliary and in aid of the legal process, if the plaintiff prevails, the only relief decreed in the equity suit is to avoid and cancel the obstruction. The desired auxiliary aid has thus been extended, the creditor resorts again to his legal writ and thereby secures his satisfaction.

The fraudulent obstruction being removed, the legal remedy becomes adequate and complete and the jurisdiction in equity consequently ends.

The actual money payment is never accomplished through the sale by an equity court under its own decree of ordinary legal assets.

As the jurisdiction is assumed for a special and restricted purpose, the case is an exception to the rule that equity having assumed to act, will proceed to a complete decree.

This doctrine is sustained by the precedents.

In *Beck* v. *Burdett*, 1 Paige, 308, the opinion says: "The obstructions being removed, he may proceed to "enforce the execution by a sale of the property."

In a subsequent case the Court of Appeals of New York again set the boundaries beyond which the equity decree should not go.

"In these cases the aid of the court of chancery was "sought in the execution of the legal process, so that the "satisfaction when obtained was had by means of and "through the instrumentality of the legal process alone. "To entitle the party to this aid it was incumbent upon "him to show that there was property on which he had "obtained a legal lien, either by virtue of his judgment "docketed, if real estate, or by virtue of an execution is-"sued, if chattels; so that the obstructions being removed "by the action of the court of equity, he could pursue his "legal remedy with effect."

Crippen v. *Hudson*, 13 N. Y., 166.

The complainant "is not entitled to a decree directing "the sale of the real estate. The conveyance "by his judgment debtor to the other defendants having

"been declared void as against him, he must be left to "pursue his remedy upon his judgment.

"It is not the practice of courts of equity to di- "rect a sale of real estate under a decree upon a cred- "tor's bill when a legal remedy is adequate."

Hendrickson v. *Winne*, 3 How. Pr., R. 127.

This rule is approved in Ohio.

Gormley v. *Potter*, 29 Ohio S., 597.

This court has also pronounced several judgments on this subject.

In *Jones* v. *Green*, 1 Wall., 332, the rulings in *Beck* v. *Burdett* and *Crippen* v. *Hudson*, are approved, and the basis of the jurisdiction was said to be "to remove the "obstruction, and thus enable the creditor to obtain a full "price for the property that the suit is brought."

In *Freed S. & T. Co.* v. *Earl*, 110 U. S., 710, the opinion says, "the ground of the jurisdiction in equity is "merely to aid the legal right by removing obstacles in "the way of its enforcement at law."

The precise question arose and was decided in

Ward v. *Chamberlain*, 2 Black, 445.

A creditor by a money decree in admiralty, filed his bill to set aside some alleged fraudulent transfers of his debtor's real estate, and also prayed that the decree should specifically order the sale of the land and apply the proceeds on the plaintiff's debt.

The case went up on a division. The last question certified was, whether the court had the power to sell the property under its own decree.

The opinion says:

"Applying these principles to the present case, it is "clear that the complainants were entitled to a discovery, "and to have the cloud removed from their title, but "equity will not interfere under the circumstances stated "to decree that the lands shall be sold and the proceeds "applied as prayed in the bill of complaint. Affirmative "answers must be certified to the first three questions, "and to the fourth, that the complainants under the de- "murrer are entitled to so much of the relief prayed for "as has respect to the removal of the cloud upon their "title to the land described in the bill of complaint, but "that the real estate mentioned could not be reached by "proceedings in chancery to satisy the aforesaid decree."

This decision was cited and approved in the opinion in *U. S.* v. *Wilson*, 118 U. S., 89.

In view of these authorities it is difficult to apprehend the theory upon which it could be maintained that a sale and conveyance by the commissioner under this decree would pass a good title to the real estate ordered to be sold.

The receiver appointed as shown by the record was only a chancery receiver. He was not a statutory assignee. His powers were possessory only. The title to the corporate property did not pass to him either by virtue of his appointment, nor was the appellant ordered to convey. Indeed the order required him not only to continue the manufacturing business "in the same man- "ner that it has heretofore been carried on by said com- "pany," but he was specifically directed to do this "as "such receiver in the corporate name of said company." (Rec., 6.)

It thus plainly appears that the appellant holds the legal title to its real estate. There is no judgment lien

thereon. The recoveries decreed herein did not constitute liens because the judicial custody prevented any such liens from attaching to the property.

Neither does the decree enforce any specific lien created by contract or statute, or implied under the rules of equity.

When a mortgage is foreclosed the decree only effectuates the power of sale contracted for by the mortgagor, and the legal title after sale takes effect, by relation to the original lien, resulting by statute from the execution of the mortgage.

When equity decrees the sale of equitable assets, it simply enforces a lien created by the filing of the bill in the nature of an equitable mortgage. (3 Pomeroy, §§ 1414, 1234.)

This decree is not sustainable on any theory which usually applies to chancery proceedings. It assumes to order the sale of specific land by a commissioner, the legal title whereof is in appellant and which is not subject to any contract, statutory or equitable lien whatever.

In the absence of any specific lien upon land, equity is without power to decree a specific remedy against it. The legal title to real estate which is not directly the subject-matter of controversy before it, cannot be sold and aliened by its decree.

It has no inherent power to sell and transfer the legal title to property subject to execution, any more than ordinary process at law can reach equitable assets.

VIII. EQUITY COURTS AS SUCH HAVE NO INHERENT POWER TO ASCERTAIN THE DEBTS AND SETTLE ALL THE AFFAIRS OF INSOLVENT CORPORATIONS. SUCH JURISDICTION IS WHOLLY STATUTORY. FEDERAL COURTS HAVE NO POWER TO ADMINISTER ANY SUCH "WINDING UP" LAWS OF THE STATES, EVEN IF ENACTED.

It is fully demonstrated by the record that the Circuit court in this action assumed and exercised a plenary jurisdiction to ascertain, adjust and decree all the affairs of the appellant. If its decree is affirmed and executed it necessarily results that a corporation existing under state laws has at the suit of common creditors been as completely wound up and dissolved under an equity decree in a Federal court as though it had been accomplished under proceedings in insolvency under some express enactment. Legislation in many of the states creates a code of procedure by which the local courts are vested with specific jurisdiction to administer and distribute the assets of insolvent corporations. The vital principle of all such statutes is that the jurisdiction, in order to be effective, must proceed *in rem*, and thus conclude all creditors by its action. The appointment of a receiver or trustee in such proceedings differing altogether from a provisional receivership in chancery is held to be the final order dissolving the corporation and the basis of the creditors rights. By force of the law, the title of the corporate property becomes at once vested in the receiver, whose powers and estate are derived wholly from the statute, and not the order of appointment. Equally the method of converting the assets, the probate of claims and the priority of distribution, are determined by the law.

There is no statute of Ohio by which the creditor of a local corporation, either by judgment or on contract, can initiate an involuntary bankruptcy proceeding against such debtor and proceed to close up its affairs.

No court of Ohio, either at *nisi prius* or on appeal has ever asserted the existence of such visitorial power over corporations.

Even if such an insolvent system had been created by the laws of Ohio and jurisdiction vested in the local courts to execute the statute, it seems clear that the Circuit Courts of the United States in equity would possess no rightful power to entertain proceedings under such state law, any more than they have jurisdiction concurrently with the state courts to probate wills or administer generally, the estates of deceased persons.

Jurisdiction in equity is not identical with proceedings in insolvency or bankruptcy. Jurisdiction in the latter instance is *sui generis*, specially created and vested. Even when exercisable by courts of equity, it is not by reason of any original rightful cognizance, but solely by virtue of an express statutory grant of power.

Bankruptcy jurisdiction in England exists wholly apart from what is known as the rightful domain of her equity courts. The acts of parliament creating the systems of bankruptcy and "winding up" of insolvent corporations conclusively establish that inherent equity jurisdiction, as understood in that country, is wholly without power to adopt methods or accomplish results identical with those provided by such express enactment.

While the equity courts of the United States can ameliorate the remedies it administers and adopt and enforce an enlarged equitable right which is created by

local statute, it must be in subjection to the fundamental restriction, that the remedy must be substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal court, and must not depart from what legitimately belongs to usual equity practice.

Clark v. *Smith*, 13 Pet., 195.

The ordinary equity practice, as observed in England, does not embrace and is not consistent with the procedure in insolvency.

The contrary view would compel the Federal courts, in administering an equitable jurisdiction which is said to be uniform throughout the United States to adopt and enforce, all the widely differing systems of insolvent laws adopted by the several states.

In the absence of any local statute giving color to the exercise of such jurisdiction the appellees are necessarily compelled to sustain the proposition that the Circuit Court by virtue of its general equity powers alone had rightful jurisdiction to ascertain its debts, sell its estate and "wind up" the appellant, because it was alleged to be "insolvent."

This is equivalent to asserting that equity, in the absence of a system of bankruptcy or insolvency can lawfully evolve and enforce a vague and discretionary one of its own.

As applied toward individual insolvent debtors, no one would dare support a proposition so preposterous.

It was, however, contended below and doubtless will be repeated here, that such marked distinction exists between corporate and individual insolvents, as to fully sustain the sequestration and sale of appellant's property.

The basis of this claim for such exceptional enlarge-

ment of judicial power over the property of corporate debtors rests on two theories.

First. That equity must regard an insolvent corporation as civilly dead, and should therefore seize and administer its property.

C. J. Marshall declared in *Prov. Bk.* v. *Billings*, 4 Pet., 514, "the great object of a corporation is to bestow the "character and properties of individuality on a collective "and changing body of men."

No court, whether of equity or common law jurisdiction, has, therefore, any right to deal with a corporation as dead when it is actually alive. The termination of its existence is not the result of some invented fiction. It is ascertainable as a fact with the same precision as the decease of a natural person. It dies only as the result of voluntary surrender of its franchises, the repeal of its charter, or as the result of some judicial sentence in a direct proceeding by the state. An equity court, and especially a federal one, has not the semblance of power to either directly or indirectly dissolve the corporation, or in the absence of any direct sentence of ouster to collaterally proceed to decree against its property upon the fiction that it is to be considered as no longer possessed of capacity.

The laws of Ohio created the appellant and until its existence ends in some manner authorized by those laws, it has full capacity to own and enjoy its property and deal with its creditors exactly as an individual may do.

The Circuit court had no power either to end its life or treat it as dead.

If the mere fact of insolvency existing before suit was brought *ipso facto* created civil death, then the action it-

self was an absurdity, as the only defendant was a corporation without either capacity or life.

It was equally absurd to proceed to decree when the only process upon which to base the jurisdiction, was served upon the former officer of a corporation no longer existing.

Notwithstanding the fiction, the fact remains that the defendant was sued as a corporation in full life; its existence has never been terminated in any way known to the law; it has never been ordered to deed its real estate or assign its personal property, and it now holds the legal title thereto as fully as it did before this suit was brought. By express order the receiver's business has been carried on in the corporate name; the money decrees in favor of the creditors were directly *in personam* against appellant; and it was ordered by name within five days to pay these recoveries in order to protect its property from sale.

Upon such a record it is apparent that the appellant must be held to be a corporation with full life and capacity.

Bank of Bethel v. *Bank*, 14 Wall., 383.

Another theory invoked to sustain the judicial action is:

Second. The assets of a corporation become, upon insolvency, a trust fund for the benefit of all creditors rateably, and equity will seize and appropriate them for that purpose.

If, as the authorities declare, corporate ownership of property in the absence of qualifying statutes, is the equivalent of individual ownership, the vague doctrine of a trust has no application.

In one sense every debtor holds his property in trust

for his creditors. He is not permitted by any device to secure to himself the enjoyment of any portion to the prejudice of his creditors. In this view corporate property is a trust fund also, and stockholders cannot divide any share thereof among themselves leaving corporate creditors unpaid. Creditors holding mere personal obligations of the corporation have no primary lien, charge or equity against the corporate assets themselves. Nor does the fact of even ascertained insolvency create any such equity against specific corporate property any more than in case of individual ownership.

This court has fully approved the doctrine of Lord Harwicke in *Lacam* v. *Martius*, 1 Vesey, 312, which was cited in *Williams* v. *Brown*, 4 Johns., Ch. 685.

"This court does secure an equitable distribution of "the real and personal assets of the deceased debtor upon "the terms and under the limitations explained at "large in the case of *Thompson* v. *Brown*, but the "doctrine in that case does not apply to the estates of "debtors in full life for there is no equitable trust created "and attached to the distinction of the effects in the latter "case."

Freed S. & T. Bank v. *Earl*, 110 U. S., 710.

The appellant is now and was when suit brought "a debtor in full life."

It stands in judgment that no trust or charge regulating the distribution of assets arises upon the insolvency of a firm. The members are liable to suit as before and any creditor can obtain a lien on the assets by superior diligence.

Ld. Eldin in

Ex parte Ruffin, 6 Vesey, 119.
Vanalstyne v. *Cook*, 25 N. Y., 489.
Blow v. *Gage*, 44 Ill., 208.
Crippen v. *Hudson*, 3 Keman, 161.

Acting in good faith the debtor notwithstanding insolvency, can in the absence of a prohibiting statute, carry on business, alienate his estate, and prefer creditors by payment or security.

A corporate debtor has exactly the same right, unless restrained by some express enactment. There is no such restraint in any Ohio legislation.

This absolute right to the use, enjoyment and power of alienation and preference is possessed by the corporate debtor to precisely the same extent as though it was a natural person.

2 Perry on Trusts § 588.

It logically results from this, that the creditors of insolvent corporations in the absence of legislation which restrains them have exactly the same right to sue the debtor and fasten a lien upon its property as in case of an individual.

These correlative rights of debtor and creditor are wholly inconsistent with the idea that insolvency by its own vigor operates as an implied assignment of the entire corporate property for the equal benefit of creditors.

The precise point arose in *Mickles* v. *Roch. City Bank* 11 Paige, 118.

The Genessee Cotton Mills became hopelessly insolvent, suspended business, and its trustees resolved to close up its affairs. Long afterwards, and with notice, the bank being a creditor, brought suit against the insolvent, re-

covered judgment and sold out its real and personal property. Another creditor brought suit to impeach these transactions, but they were sustained.

The opinion says:

"Until a judgment upon a *quo warranto*, or a decree "of this court has declared a surrender of the corporate "franchises and the dissolution of the corporation, any "creditor is at liberty to proceed by suit against the cor- "poration and its property to obtain satisfaction of his "debt in the same manner as if the alleged surrender by "insolvency or non-user had not occurred."

In a recent judgment of this court it is declared that the "rules applicable to a going corporation, remain appli- "cable notwithstanding it may have become insolvent, "and ceased to carry on its operations, when it continues, "in the possession and exercise of all corporate powers "essential to the collection of debts, the enforcement of "liabilities and the application of assets to the payment of "creditors."

Hawkins v. *Glenn*, 131 U. S., 319.

The attempt was made in New York at a very early day to establish a comprehensive and exceptional jurisdiction over corporations in equity, based upon the idea of a trust. Chancellor Kent after an elaborate review of the English cases, held that chancery had no visitorial power over such bodies, "but at the same time I admit "that the persons who from time to time exercise the "corporate powers may in their character of trustees be "accountable to this court for a fraudulent breach of trust "and to this plain and ordinary head of equity, the juris- "diction of this court over corporations ought to be con- "fined."

Att. Gen. v. *Utica Ins. Co.*, 2 Johns Ch., 389.

The doctrine of equitable cognizance over the assets of insolvent corporations underlies a decision rendered by the highest court in Connecticut, in 1826.

The Eagle Bank failed. Subsequently it mortgaged its real estate, assigned divers securities, and paid cash to one of its creditors—the Savings Bank of New Haven, who knew of the insolvency. Catlin another creditor of the insolvent bank brought suit in equity impeaching these transactions and asking to have them set aside.

The court thus state the theory of the bill:

"It has been insisted for the plaintiff that on the actual "insolvency of the bank the corporation were the trus- "tees of the creditors, and if this be true the latter "became the *cestui que trusts* of all the corporate estate." It thereupon repudiates the equitable jurisdiction in these words:

"The insolvent banking corporation is just as much a "trustee of the creditors, and no more, as the insolvent "individual is the trustee of his creditors. The relation "of debtor and creditor exists in both cases, but from "this relation no trust arises."

With reference to the insolvency of corporations, it was declared:

"It is the law of chancery that they may prefer one "creditor to another, and this on a principle of analogy "refutes entirely the supposition of a trust in this case."

For these reasons it was finally adjudged:

"It is unquestionable that the jurisdiction of chancery "does not extend to the disposal of the corporate estate "or funds of the Eagle Bank."

Catlin v. *Eagle Bank*, 6 Conn., 233.

This ruling was cited and approved in the case of *Pond Co.* v. *Clark*, 25 Conn., 97, wherein it was distinctly held that the mere insolvency of a corporation neither impairs its power to manage its affairs nor converts its property into a trust fund for the benefit of its creditors.

The leading case of *Catlin* v. *Bank* has been followed and made the principle of the decision in many cases.

Huxton v. *Bishop*, 3 Wend., 13.
Dana v. *Bank*, 5 S. & R., 224.
DeRingher v. *Church*, 3 Comst., 238.
Bank of U. S. v. *Huth*, 4 B. Mon., 423.
State v. *Bank*, 6 G. & J., 205.
Arthur v. *Bank*, 9 S. & M., 430.

Upon this ground text writers and courts uniformly deny that equity courts have any power to liquidate the affairs of corporations, unless specially empowered by statute.

Morawetz says: "Creditors of a corporation have no "greater rights against their debtor than the creditors of "an individual would have. They must enforce legal "claims at law, and reach equitable assets in equity." 2 Vol., Sec. 860, 1,040.

The text of High is: "It is to be observed at the "outset that the general jurisdiction of equity over cor- "porate bodies does not extend to the power of dissolv- "ing the corporation or of winding up its affairs and "sequestering the corporate property and effects in the "absence of express authority." High on Rec., §283.

According to Pomeroy, §171, 1,316, these actions to wind up corporations are wholly statutory and "do not "belong to the general equitable jurisdiction."

The cases are numerous where it has been decided that a Court of equity, as such, has no power to appoint a receiver and decree a sale, and full settlement of the affairs of a corporation, on the allegation of insolvency.

Neall v. *Hill*, 16 Cal., 146.
French Bank Case, 53 Cal., 495.
Treadwell v. *Man. Co.*, 7 Gray, 399.
Baker v. *R. R. Co.*, 34 La. Ann., 754.
State v. *Ins. Co.*, 8 Humph., 238.

In *Pond* v. *Fram. & Lowell R. R.*, 130 Mass., 194, the Supreme Judicial court of Massachusetts thus refused the application of a creditor without judgment for a receivership of an insolvent corporation.

"The allegation that the defendant corporation is insol-
"vent does not aid plaintiff. In the absence of any stat-
"ute giving this power, this court has no authority to
"act as a court of insolvency for the liquidation of the
"affairs of an insolvent railroad corporation."

Not a single respectable authority, either in this country or England, can be found which asserts that equity courts, in the absence of an express statute enlarging their powers, have any rightful jurisdiction at the suit of creditors without judgment to seize the property of a corporation, sell and distribute the proceeds among creditors and wind up its affairs.

In the absence of enabling legislation the doctrine that corporate property is a trust fund only authorizes an equity court to apply protecting and corrective remedies within the limitations stated in *Curran* v. *Arkansas*, 15 How., 307 and *Railway* v. *Ham*, 114 U. S. 594.

As there was in this cause no relation except that of creditor without lien, charge, equity, express trust or

claim of fraud, the case does not fall under any established head of equity power.

It is impossible upon the vague idea of a trust to create a new and dangerous enlargement of equity power, without as expressed in *Catlin* v. *Bank*, "taking leave of every "established principle and beating the air."

HENRY CRAWFORD.

December, 1889.

Office Supreme Court U. S.
FILED,
MAR 10 1890
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 227.

BROWN, BONNELL & COMPANY,
APPELLANTS,

vs.

THE LAKE SUPERIOR IRON COMPANY, THE JACKSON IRON COMPANY AND THE IMPORTERS AND TRADERS NATIONAL BANK OF NEW YORK,
APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEE.

FRANCIS J. WING,
Solicitor for Appellee.

In the Supreme Court of the United States.

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Appellees.

BRIEF AND ARGUMENT FOR APPELLEE.

FRANCIS J. WING,
Solicitor for
Appellee.

STATEMENT OF THE CASE.

Owing to the fact that the printed record and additional record, filed under stipulation in this cause, are somewhat irregular and confused in arrangement with respect to the dates of the various events recorded, I have thought that it would assist the court to make the following statement of events occurring in the cause, in their chronological order, with their respective dates of occurrence, together with references to the pages of the record and addition to the record.

February 20th, 1883, bill filed.
RECORD, PAGES 1 TO 3.

February 20th, 1883. Subpœna issued for defendant, Brown, Bonnell & Company.

ADDITION TO RECORD, PAGE 6.

February 20th, 1883. Appearance of defendant.

ADDITION TO RECORD, PAGE 7.

February 20th, 1883. Affidavit of H. H. Brown.

ADDITION TO RECORD. PAGE 8.

February 20th, 1883. Decree appointing receiver.

RECORD, PAGE 5.

Bond of receiver.

ADDITION TO RECORD, PAGE 7.

February 21st, 1883. Service of subpœna on defendant, Brown, Bonnell & Company.

ADDITION TO RECORD, PAGE 6.

February 26th, 1883. Order to receiver to institute suits.

ADDITIONAL RECORD, PAGE 9.

March 28th, 1883. Supplemental bill filed.

RECORD, PAGE 3.

April 6th, 1883. Subpœna on supplemental bill and return.

ADDITION TO RECORD, PAGE 10.

April 23rd, 1883. Order for creditors to file claims by petition.

ADDITION TO RECORD, PAGE 12.

May 9th, 1883. Appearance docket showing dates of filing petitions of creditors under former order.

ADDITION TO RECORD, PAGE 249.

May 17th, 1883. Petition of Rossie Iron Works.

ADDITIONAL RECORD, PAGE 13.

Petition of the Greenville National Bank, showing character of petitions filed under former order.

ADDITION TO RECORD, PAGE 252.

May 29th, 1883. Petition of Florence Mining Company.
ADDITION TO RECORD, PAGE 15.

June 6th, 1883. Petition of Manufacturers and Traders Bank.
ADDITION TO RECORD, PAGE 20.

June 14th, 1883. *Pro confesso* on original and supplemental bills.
ADDITION TO RECORD, PAGES 21-22.

July 17th, 1883. Order appointing special master to take an account of claims of creditors and marshal liens.
RECORD, PAGE 33.

Report of master on claim of Florence Mining Company.
ADDITION TO RECORD, PAGE 23.

Exceptions to such report.
ADDITION TO RECORD, PAGE 25.

November 24th, 1883. Demurrer of R. J. Wick to the bill of complaint.
ADDITION TO RECORD, PAGE 29.

November 24th, 1883. Pleas of Brown, Bonnell & Company.
RECORD, PAGE 9.

November 26th, 1883. Motion of complainant to strike from files demurrer of Wick.
ADDITION TO RECORD, PAGE 33.

November 26th, 1883. Motion to strike from files pleas of Brown, Bonnell & Company.
ADDITION TO RECORD, PAGE 33.

December 18th, 1883. Motion to discharge receiver.
RECORD, PAGE 10.

December 24th, 1883. Order striking from files demurrer of Wick and motion of Mathews, Williams, et al.
ADDITION TO RECORD, PAGE 61.

December 24th, 1883. Leave to Commercial National Bank and others to file answers to original and supplemental bills; as of December 18th, 1883.

ADDITION TO RECORD, PAGE 61.

Joint and several answer and cross-bill of Commercial National Bank, Charles A. Otis, et al.

ADDITION TO RECORD, PAGE 34.

December 24th, 1883. Motion to discharge receiver overruled.

RECORD, PAGE 10.

December 24th, 1883. Order for clerk to pay judgment of Negaunee Concentrating Company.

RECORD, PAGE 11.

January 28th, 1884. Reply to answer of Commercial National Bank filed.

ADDITION TO RECORD, PAGE 62.

June 24th, 1884. Subpœna for Brown, Bonnell & Company on intervening petition of Commercial National Bank.

ADDITION TO RECORD, PAGE 210–211.

February 20th, 1884. Order that answer of Commercial National Bank and others be treated as intervening bill, and leave given to one or more creditors to answer same.

ADDITION TO RECORD, PAGE 63.

March 1st, 1884. Answer of Second National Bank of Ravenna to intervening petition of Commercial National Bank.

ADDITION TO RECORD, PAGE 63.

March 1st, 1884. Response of Manufacturers and Traders Bank to intervening petition of Commercial National Bank.

RECORD, PAGE 30.

June 11th, 1884. Report of special master on claims of creditors.

RECORD, PAGE 36.

January 13th, 1885. Supplemental report of special master.
RECORD, PAGE 36.

May 2nd, 1885. Report of special master on issues made by the intervening petition of the Commercial National Bank and others.
ADDITION TO RECORD, PAGE 68.

May 2nd, 1885. Testimony taken before master on issues made by intervening petition of Commercial National Bank and others filed.
ADDITION TO RECORD, PAGE 74.

June 1st, 1885. Exceptions to report of special master filed May 2nd, 1885.
ADDITION TO RECORD, PAGE 215.

September 24th, 1885. Decree of court with respect to exceptions of Warden to report of special master on the issues made by intervening petition of Commercial National Bank.
ADDITION TO RECORD, PAGE 220.

September 26th, 1885. Order for receiver to take an account of the plant and property generally that has come into his possession as receiver, and report to court.
ADDITION TO RECORD, PAGE 221.

November 20th, 1885. Report of receiver in compliance with the above order of court.
ADDITION TO RECORD, PAGE 221.

February term, 1886. Final decree in cause.
RECORD, PAGE 38.

At the time of the overruling of the motion to discharge the receiver, the record shows that all but one of the creditors of the defendant had filed petitions setting forth their respective claims, praying general equitable relief, in accordance with the order of court made April 23rd, 1883.
ADDITION TO RECORD, PAGE 249 TO 252.

On December 1st, 1883, there was filed the answer and cross-bill of the Commercial National Bank and others, setting up claims to a mortgage lien on the real estate of the defendant. The claims of two of the creditors, viz. The Negaunee Concentrating Company, one of the complainants, and The Manufacturers and Traders Bank of Buffalo, one of the subsequent petitioning creditors, appear to have been in the form of *judgments*.

RECORD, PAGE 11 AND ADDITION TO RECORD, PAGE 20–21.

Thirty-two of the creditors who had come into the case by filing their several petitions in response to the invitation of the bill and the order of the court, and whose claims amounted in the aggregate to $570,806.61, had, on November 22d, 1883, two days before the filing of the pleas of the defendant, and twenty-six days before the filing of the motion to discharge the receiver, obtained judgments on such claims in the state court of the county in which the real estate of the defendant was situated, and consequently would be preferred in the event such motion or pleas should prevail.

ADDITION TO RECORD, PAGE 104.

Additional judgments of a similar character were obtained by creditors before December 24th, 1883, the date of the overruling of the motion, in the aggregate amount of $147,467.79, making in all, judgments in the amount of $718,274.40.

ADDITION TO RECORD, PAGES 104-105 and 166-167.

These judgments were all confessed by the defendant, Brown, Bonnell & Company, in pursuance of a plan to give unjust and inequitable preferences to those creditors in whose favor they were entered. This fully appears from the testimony of F. H. Mathews, in the addition to the record from pages 166 to 172 inclusive.

A *pro confesso* had been taken on the original and supplemental bills ; the receiver had been directed to institute litigation for the purpose of collecting and protecting the assets of the defendant, and had, under the direction of the court,

been conducting the large business of the defendant for a period of nine months.

Stockholders and creditors, the only *cestuis que trust*, had acquiesced in the action of the court in appointing the receiver, and in his operation of the works of the defendant, and by such acquiescence, had induced each other to believe that no advantage would be attempted to be gained by one over the other.

It was then attempted by certain of the creditors, through the instrumentality of the officer of the defendant corporation, to oust the circuit court of its jurisdiction by paying off the Negaunee Concentrating Company's judgment, in order that the claims of these certain creditors might become preferred claims, and that the property of the defendant might pass into the hands of a receiver appointed by a state court, which court would not administer remedies at law, but would assume jurisdiction in equity of exactly the same character as that being exercised by the circuit court, with the single exception that preferences would be allowed to the creditors, who, after their appearance to the original and supplemental bills, had obtained judgments.

That, in further pursuance of this plan, a receiver had been appointed by the state court who was to step into the position of the receiver appointed by the circuit court, appears, also, in the testimony of Mathews, pages 167 and 169 of addition to the record.

It will be seen, by examining the case, that the only questions raised by the defendant are on the motion to discharge the receiver, and by the pleas of the defendant to the original and supplemental bill.

RECORD, PAGES 9 AND 10.

The motion to discharge the receiver is put upon the grounds as appears therein :

"1st. That the court had no jurisdiction over the subject matter of the controversy and no jurisdiction to appoint a receiver.

"2d. Because on November 24th, 1883, the said judgment of the Negaunee Concentrating Company was fully paid and discharged, together with all costs, by payment of the full amount thereof to the clerk of this court as duly appears of record."

RECORD, PAGE 10.

The first plea of the defendant sets up the same facts as to payment of the judgment of the Negaunee Concentrating Company that is referred to in the second ground of the motion to discharge the receiver.

The second plea is that the bill and supplemental bill show that the complainants have a plain, adequate and complete remedy at law, and that in consequence and on the face of the pleadings the court has no jurisdiction.

The only questions, therefore, raised by either the motion or the pleas, are:

1st. Did the circuit court have jurisdiction to appoint a receiver upon the allegations of the original and supplemental bills.

2nd. Was such jurisdiction, if obtained, ousted by the subsequent payment of the Negaunee Concentrating Company's judgment.

ARGUMENT.

On the question as to whether it appears from the original and supplemental bills that the circuit court had no jurisdiction of the subject matter of the controversy and no jurisdiction to appoint a receiver, it has at all times been urged in the court below, by counsel for the defendant, that this contention was based upon the fact, that it is not alleged in the original bill that an execution was issued on the judgment of the Negaunee Concentrating Company, and returned *nulla bona;* that such issuance and return of execution was a fact necessary to be alleged in the bill to give the court jurisdiction.

In the State of Rhode Island vs. The Commonwealth of Massachusetts, 12 Peters, 718, it is said by this court: "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them."

In Sage vs. Memphis & Little Rock Railroad, 125 U. S., Reports, 376, this court has said, through Mr. Justice Harlan: "Whether a receiver shall be appointed is always a matter of *discretion*, to be exercised sparingly and with great caution in the case of *quasi* public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises."

Certainly whatever it is within the *discretion* of a court to do must be within its jurisdiction.

The fact that execution has been issued and returned *nulla bona* is important only in that it proves under some circumstances that the complainants have exhausted their remedy at law, as in the case of a judgment creditor acting for himself alone, asking for the appointment of a receiver for his debtor's property, which, in fraud of the creditor's rights, has been put into the hands of a third person beyond the reach of execution. It is properly held in such case, essential, that execution should have been so returned.

The sole purpose of alleging such an issuance and return of execution is to show conclusively that the property of the debtor cannot be reached *at all* by the creditor, without the aid of the exrtaordinary power of a court of equity.

There are, of course, many occasions and instances in which it can be made to appear that there is no adequate remedy at law, for a complainant otherwise than by return of execution *nulla bona*.

But the case at bar is different in its character from an ordinary case of creditor's bill. It was plain from the bill that the enforcement of the rights and remedies at law of any creditor who was in a position so to do, by execution, would be unjust and inequitable to the other creditors and would not

give adequate relief to all. The bill was brought by three creditors, one of whom had a judgment and the other two liquidated claims not yet due. These latter creditors evidently had no remedy at law, and, like many other creditors, in whose behalf the bill was brought, as well as for the complainants named, were in a position of the gravest danger, unless assisted by the chancellor in the appropriate way. For these complaining creditors, or one of them, to have alleged that they had themselves done the very thing which they asked the court to prevent others from doing, would have been manifestly absurd.

The obtaining of the judgment alone, gave a lien to one of the complainants, on the real estate of the defendant, and probably such complainant had a bare legal right to enforce this lien of judgment by issuance of execution, but such enforcement would have tended to injure the property of the defendant as a whole, and, consequently, to defeat partially at least, the rights of all other creditors situated less favorably.

Therefore, finding that the defendant was insolvent, and having proper regard for the equitable rights of others, it abstained from interfering by execution with the property and assets which had then become a trust fund for the equal benefit of all creditors, and joined with the two other complainants for the benefit of all creditors, and invoked the exercise by the court of one of the most ancient and honored canons of equity jurisprudence; *equality is equity.*

In the case of Union Trust Company against Illinois Midland Railroad Company, 117 U. S. Reports, 455, this court, through Mr. Justice Blatchford, says: "Property subject to liens and claims and debts of various characters and ranks, which is brought within the cognizance of a court of equity for administration and conversion into money and distribution is a trust fund; it is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved

land may lie idle, with only payment of taxes; improved property should be rented, movable property that is not perishable may be locked up and kept; but if perishable it must be sold by way of preservation. A railroad and its appurtenances is a peculiar species of property—not only will its structures deteriorate, decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order."

In the case above quoted, there was in question the validity of certificates issued by a receiver appointed on a bill brought by a stockholder and two judgment creditors solely for the purpose of preserving the property from sale under execution until the whole indebtedness of the defendant could be ascertained, when, it was alleged, that a sufficient amount of money could be raised to pay off all indebtedness and have a sufficient surplus to run the road for the benefit of the stockholders.

The prayer of the bill was, that a receiver be appointed of all the rights and franchises of The Illinois Midland Company, and of all the property in its control; and that an account be taken of all the claims, liens and liabilities of its stockholders and creditors, and of those of the corporations above named, and they be ordered to be paid and adjusted, as the respective rights and interests of such stockholders and creditors should appear; and for further and other relief according to equity.

The jurisdiction of a court of equity to appoint a receiver to preserve the property as a trust fund for various classes of creditors, general as well as judgment, was acknowledged by this court in sustaining the validity of the receivers certificates. The circumstances and facts of the last case cited are not dissimilar to the facts and circumstances alleged in the original and supplemental bill filed in the case at bar, except that in the latter the corporation is alleged to be insolvent.

In Sage vs. Memphis & Little Rock R. R. Company, 125 U. S., 361, above referred to, the complainant was a judg-

ment creditor who had *not* issued execution on his judgment, and who brought suit for the benefit of himself alone, and not for the benefit of all creditors; and yet in that case it is said, "The latter (the complainant,) was a judgment creditor of the company, and it was at his instance, in a suit commenced by him, that its property was put in the hands of a receiver. This was done because in the opinion of the court, the appointment of a receiver was necessary to protect plaintiff's interests and rights. If the grounds set forth in the bill were not sufficient to justify the appointment of a receiver *they were ample to give the court jurisdiction.* In the Union Trust Company against the Illinois Midland R. R. Company, 117 U. S., 434-458, the court said, 'The co-plaintiffs with Harvey were judgment creditors of the Paris & Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver in the interest of all the creditors of all four of the corporations, to *prevent the levy of executions* on such property; and it prayed for a judicial ascertainment and marshaling of all the debts of all the corporations and their payment and adjustment as the respective rights and interests of creditors might appear and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits.' In the present case, it is true *Sage did not sue out execution upon his judgment* and have a return *nulla bona;* but that point has become immaterial—the railroad company *made no such objection at the time the receiver was appointed,* besides suing out an execution would, according to the facts and admissions of the parties, have been an idle ceremony, causing useless expense, and *bringing no real benefit* to the plaintiff. It is true, also, that Sage did not sue in behalf of all of the credit-

ors of the company, or of such as might come in and contribute to the expense of the litigation; he was not bound to pursue that course. It was his privilege, under the law, to sue for his own benefit, and it was within the power of the court, for his protection as a judgment creditor, to place the property of the debtor company for administration under its orders. We do not mean to say that a single judgment creditor, or any number of such creditors of a railroad company, are entitled, as a matter of right, to have its property put in the hands of a receiver, merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of *quasi* public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises. All that we say in this connection is, that under the circumstances presented in this case, *the appointment of a receiver is within the power of the court.* The order appointing and directing him to operate and manage the property was not a nullity."

But the case at bar presents a much stronger ground in its circumstances for a claim that the circuit court had jurisdiction to appoint a receiver, than did the case above quoted from. The bill was brought, as in the case referred to, partly on a judgment, but in behalf of all creditors instead of one alone; it showed plainly the great danger of the good will, business and property of the defendant being destroyed by threatened attachments, judgments and executions and the especial danger to those complaining creditors who by reason of the fact that their claims were not due, had no remedy at law whatever; it showed ample excuse for the non-issuance of execution at the time of filing the original bill, when it alleged *that the defendant corporation was insolvent*, and that *such issuance and levy would work irreparable injury and would be inequitable as among creditors.* By the supplemental, or, perhaps more accurately speaking, the amended bill, it was shown that execution had been issued

and returned *nulla bona*, if as a simple matter of form that allegation was necessary, and further showed that there were liens on the property of the defendant and a necessity for an accounting and marshaling of liens, and prayed for an ultimate sale of the property of the defendant and an equitable distribution of the proceeds.

It can, then, be confidently urged in the light of these authorities that the circuit court had jurisdiction to appoint a receiver upon the allegations of the original and supplemental bills, or at least, that such appointment was not a nullity.

But broader ground for this contention is found in the proposition, that the assets belonging to and in the possession of an insolvent corporation constitute a trust fund for the equal benefit of creditors and that courts of equity have, always, jurisdiction to administer trusts, when their interference by whatever remedy is appropriate is necessary to the protection and enforcement of such trust.

In the case of Sawyer vs. Hoag, 17 Wall., 620, this court, through Mr. Justice Miller, said, "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation; and when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not have sooner arisen."

This case has become a leading case and has been cited and the doctrine therein announced, approved and followed in numerous instances.

In Upton, assignee, vs. Fribilcock, 91 U. S., page 47, it is said: "The capital stock of a moneyed corporation is a fund for the payments of its debts; it is a trust fund of which the

directors are the trustees; it is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded."

In Scammon vs. Kimball, assignee, 92 U. S., page 367, the doctrine referred to is approved, and it is further said, on the authority of 7 Wall., 416 "Equity regards the capital stock and *property* of a corporation as held in trust for the payment of the debts of a corporation, and recognizes the right of creditors to pursue such properties into whosesoever possession the same may be transferred, unless the stock or property has passed into the hands of a *bona fide* purchaser;" and further, "Where the fund has been improperly distributed among the stockholders, or passed into the hands of third persons not *bona fide* creditors or purchasers, the established rule in equity is, if the debts of the company remain unpaid, that such holders take the fund charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of the debts of the corporation."

In County of Morgan vs. Allen, 103 U. S., page 508, Sawyer vs. Hoag is cited and approved and also Sanger vs. Upton, 91 U. S. 56, and it is said: "The capital stock of an incorporated company is a fund set apart for the payments of its debts. * * * The creditors have a lien upon it in equity."

In the cases of Scovill vs. Thayer, 105 U. S., 152; Patterson vs. Lynde, 106 U. S., 521, and Cook County National Bank vs. United States, 107 U. S., 452, Sawyer vs. Hoag is cited and approved.

In the earlier case of Railroad Company vs. Howard, 7 Wall., 409, Mr. Justice Clifford said:

"Equity regards the *property* of a corporation as held in trust for the payment of the debts of the corporation and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred unless it has passed into the hands of a *bona fide* purchaser."

In Curran vs. State of Arkansas, 15 Howard, 311, the court through Curtis, J., says: "Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors it follows, that a court of equity which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation, the legal title to its property had been changed." And quoting from Chancellor Kent, says further, "The rule of the common law has in fact become obsolete; it has never been applied to *insolvent* or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitutes a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied. The case of Hower vs. Thornton, 8 Georgia R. 491, and other cases before referred to in this opinion, are in conformity with this doctrine; and in our judgment, a law distributing the property of an insolvent trading or banking company among its stockholders, or giving it to strangers, or seizing it to the use of the state, would as clearly impair the obligations of its contracts as a law giving to the heirs the effects *of a deceased natural person* to the exclusion of his creditors, would impair the obligation of his contracts."

Upon these authorities it can be claimed that all the property and assets of an insolvent corporation constitute a trust fund for creditors, and that courts of equity will lend their aid for the purpose of obtaining such property from third persons other than *bona fide* purchasers; that equity will, also, interpose its authority to prevent *unequal* distribution of the fund when such distribution is attempted by means of set-offs, which would result in a preference, or, as said by Mr. Justice Miller, in Sawyer vs. Hoag: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of

all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off, for an ordinary debt to its full amount, ceased. It became a fund belonging equally in equity to all the creditors and could not be appropriated by the debtor to the exclusive payment of his own claim."

But the position of the appellant is that equity will not interfere to enforce the trust by an equal distribution of the trust fund, unless it is alleged by the complainant that he himself has attempted to secure an *unequal* distribution of such fund, for his own benefit, by the issuance of execution, and has failed to accomplish his inequitable purpose as evidenced by the return of the execution *nulla bona;* that the chancellor cannot, for want of jurisdiction, listen to an appeal to do equity unless it comes from one who can allege the existence of facts that prove conclusively that he has done other than equity; that the suitor must first soil his hands, and prove it too, before coming into a court of equity; that the time-honored maxims must be reversed, and, in effect, that jurisdiction in equity must be founded upon confessed inequity.

The simple statement of this proposition seems sufficient to condemn it, but authorities are not wanting.

Some of the older text books and decisions in describing the right of a creditor to pursue his remedy in equity, have said, perhaps somewhat carelessly, that, after the obtaining of judgment and the issuance of execution and its return *nulla bona*, the creditor could ask relief in equity; and the idea has to some extent become current that such judgment and execution and return were necessary pre-requisites to the obtaining of equity-jurisdiction in behalf of a creditor, *under any and all circumstances.* The idea grew naturally enough, because, in most cases, a creditor was seeking by means of equity, to collect his debt from asets which execution could not reach because of their intangible character, and so of course he was required to show in the first instance that he needed the assistance

of equity on accouunt of the absence of tangible property ; or else the creditor was seeking to obtain payment of his claim out of property transferred by his judgment debtor, either corporation or natural person, to other than a *bona fide* purchaser. In this latter case a court of equity would not lend its aid until the property, if any, left in the hands of the debtor, had been exhausted.

These kind of cases being the only ones in which, prior to the adoption by the courts of the idea that the property of an insolvent corporation is a trust fund, a judgment creditor ever came into a court of equity for aid, supplemental to his judgment, when, finally, the trust idea was adopted, it was to some extent carelessly assumed by the bar that the same old form of allegation, with respect to the issuance of execution and return *nulla bona* was necessary to give jurisdiction. And so, in such cases as Union Trust Company vs. Illinois Midland Railroad, before cited, where the whole theory of the bill was, that the respondent *had* property subject to levy of execution, and that such levies were threatened, and, if permitted to be made. would tend to greatly injure the property, we find, nevertheless, inserted in the bill, possibly in a spirit of abundant respect for form instead of substance, the allegation that execution has been returned unsatisfied.

The allegation must necessarily be untrue if the rest of the bill is true. But apparently some cabalistic power has been attributed to the words as an *open sesame* to the doors of a court of equity.

If the use of this allegation is not only unnecessary, but actually improper, we are forced to the admission that so long as anything remains of a trust fund, undiverted from the uses of the trust, equity will refuse to interfere to protect it ; but when once it is made to appear that all of the trust fund has been exhausted by unfair enforcements of legal rights, in violation of the principle of equity, which requires equal distribution, then for the first time will a court of chancery have jurisdiction to appoint a receiver.

In the case at bar, if we apply this rule, as urged by the appellant, we shall inevitably come to the conclusion that when as many of the creditors as could, had obtained judgment on their respective claims and had collected them by execution and sales of portions of the property and assets, made from time to time, and had thereby exhausted the whole of the property and assets of Brown, Bonnell & Co., then, if some unfortunate creditor, who had been unable to obtain a judgment as early as the rest, and whose execution in consequence had been returned *nulla bona*, had come into the court below, showing this deplorable state of things, and that there was no longer any fund that required protection, or out of which, in any way, he could hope to make his claim, then for the first time could the court have taken jurisdiction. In short, that it must have been first shown that there was no fund to be received or administered before the court could have appointed a receiver.

This surely is an instance of *reductio ad absurdum.*

Although, as has been before stated, reference has been made, more or less frequently, in decisions and text books, to the fact that, in certain cases, where a judgment creditor was complainant and a corporation was defendant, the complaining creditor, "*after obtaining judgment upon which execution had been returned nulla bona*," had filed his bill asking the appointment of a receiver, yet, in no case or text book is it affirmatively announced that, in such a case as the one at bar, where the complainants are in no sense bringing a creditor's bill, but are simply *cestius que trust* asking the protection of a trust fund and the enforcement of the trust, the obtaining of a judgment and return of execution unsatisfied is necessary to be alleged to give jurisdiction to a court of equity.

In many cases the jurisdiction of the court is put upon other ground than the return of execution unsatisfied, and no mention is made of the necessity or propriety of such allegation.

In Graham vs. Railroad Co., 102 U. S., 161, Mr. Justice

Bradley uses the following language: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity at the instance of the proper parties will then make those funds trust funds, which in other circumstances are as much the absolute property of the corporation as any man's property is his."

In the case of Coit vs. North Carolina Gold Amalgamating Co., 14 Federal Reporter, 13, the same learned justice says: "Prior to its insolvency a corporation holds its property as any other person, not in trust, but absolutely in the exercise of direct dominion and supreme control. But when a corporation becomes insolvent, then according to the holdings of courts of equity, its property becomes a trust fund for the payment of creditors. This is true at all events in cases where the property has not been subjected to execution or disposed of by way of assignment or other appropriation to particular debts. * * * The trust embraces all the property of the corporation; embraces its real estate and its choses in action."

Professor Pomeroy, in his analysis of the meaning and application of the equity maxim, "Equality is equity", says, in vol. 1, p. 410, Pomeroy's Equity Jurisprudence: "Another remarkable and most just application of the principle, often leading to results very different from those produced by the operation of legal rules, may be seen in all those instances where a court of equity acquires jurisdiction, from any cause, to wind up, distribute or settle an estate, property or fund against which there are a number of separate claimants. One example is that in settling the affairs of an insolvent partnership, corporation or individual debtor, in a creditors suit brought by one on behalf of all other creditors, where the assets are not sufficient to satisfy all demands in full; the court always proceeds upon the principle that equality is equity, and of apportioning the property *pro rata* among all the creditors."

In Terry vs. Anderson, 95 U. S., 636, Chief Justice Waite said: "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment.

To this rule, however, there are some exceptions, and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempt from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee."

The inability of a trustee to execute his trust is equally good ground for the intervention of a court of equity to preserve a trust fund, as the absence of a trustee could be.

While it is true that, in the case at bar, the corporation was not dissolved, it was admittedly *insolvent and civilly dead*, and although it had officers who, with respect to some things, could be called trustees, yet, it appears plainly that, in the very nature of things, they were powerless to execute the trust by making equal distribution among creditors, or to preserve the trust fund from invasion and unequal distribution to the advantage of those creditors who had judgments and were in a position to attack the property by levy of execution.

In the case of every insolvent corporation there is a want of a trustee.

In recognition of this doctrine courts of equity have assumed jurisdiction to enjoin individual creditors from attempting to collect their claims by process of law out of property answerable in equal degree to many, and for the further reason that a multiplicity of suits is prevented.

In Pfohl vs. Simpson et al., 74 N. Y., 142, it is said: "There is nothing in the provisions of the charter of this corporation, nor in any of the decisions which have been made

upon analogous acts, which is inconsistent with exercise in this case of the established jurisdiction of equity to forestall a multiplicity of actions, by bringing all the litigation into its own grasp in one suit for a general accounting and a complete adjustment of all rights.

"It is in cases where many persons have claims, and are prosecuting or about to prosecute them at law against one defendant, or against a class of defendants, or against a *fund*, liable in equal degree to all those persons and to others, and thus there arises the fact, or the probability of a multiplicity of actions, that this jurisdiction of equity attaches.

"It matters not whether the right of action to so prosecute arises from general principles of law or from particular provisions of constitution or of statute. If the right exists, and is likely to be used so as to produce the mischief, the jurisdiction of equity arises and attaches. * * * When equitable jurisdiction to this extent is declared, then follows the other jurisdiction of equity to restrain separate and individual actions at law in the same or other court, and to bring all proceedings into one suit and all parties to one tribunal."

In support of this doctrine are cited Weeks vs. Love, 50 N. Y., 568, and Erie Railway Co. vs. Ramsey, 45 N. Y., 637.

A similar doctrine is announced in Smith vs. Mutual Life Insurance Co., 3 Tennessee Chancery, 502.

This doctrine furnishes not only additional reason for the court below having taken jurisdiction, but recognizes fully the inability of an individual to prevent separate suits being brought against him or a fund in his possession, and that the intervention of a court of equity, in some way, is necessary, and properly within its jurisdiction.

It is founded upon the notion, as applied to this case, that the corporation could not help itself.

The doctrine is recognized in the case of Union Trust Co. vs. Illinois Midland Railroad, 117 U. S. 434, before cited.

But it really needs no argument to show that the directors or other officers of an insolvent corporation are absolutely

powerless to prevent judgment creditors from levying upon the property of the corporation so long as it remains in the hands of the corporation.

True, the directors and other officers could authorize and execute an assignment of the property and assets of the insolvent corporation to a trustee for the benefit of creditors, but if they do not do this, I submit that, in the light of authority and reason, a court of equity has jurisdiction to do it for them by appointing a receiver by way of preventing the failure of a trust.

But this court has, in effect, passed upon this very question of jurisdiction, in deciding the case of Florence Mining Co. vs. Brown, 124 U. S., 385. In that decision, delivered by Mr. Justice Field, the allegations of the original and supplemental bills now under consideration, were reviewed and considered. The court says: "In February, 1883, these corporations, namely, the Lake Superior Iron Company and the Jackson Iron Company, created under the laws of Michigan, and the Negaunee Concentrating Company, created under the laws of New York, filed a bill in chancery in the circuit court of the United States for the northern district of Ohio, against the defendant, Brown, Bonnell & Company, a corporation under the laws of Ohio, alleging that they were creditors of the latter corporation, and designating the amounts of such indebtedness; that owing to the first two named corporations consisting of certain promissory notes of the defendant, and that owing to the last named corporation being a judgment against the defendant in the circuit court rendered on that day. The bill purported to be filed, not only on behalf of the complainants, but also on behalf of all other creditors, whom it represented to be so numerous that it was impossible to make them parties. It alleged that the defendant was insolvent; that it had long been engaged in the business of manufacturing iron, and had erected blast furnaces, rolling mills and coke works, and had opened and operated coal mines; that its plant was of great value, as was also the good

will of its business ; and that it employed at least 4,000 persons in its mills and works. It also alleged that vexatious litigation had been commenced against the defendant, and more was threatened ; that such was accompanied by attachments and seizures of property, and the threatened litigation would also be accompanied by like attachments and seizures, and they would give to the creditors who were pursuing them undue advantage over those complainants whose claims were not yet due, and work them irreparable injury ; and that if such litigation should be further instituted, and the property of the defendant be attached, there was danger that it would be to a great extent destroyed, and its long established business broken up. It therefore prayed the appointment of a receiver to take charge of the assets and property of the defendant, and for further relief.

The defendant appeared at once to the bill, and thereupon, pursuant to the complainant's motion, Fayette Brown was appointed receiver of its assets and property.

In March, 1883, a supplemental bill was filed, setting forth that the property of the defendant was of such a peculiar nature that great and irreparable loss would be caused to the complainants and other of its creditors, unless its property should be preserved by the receiver in its entirety as a business during the time required to liquidate and adjust its affairs; that the Negaunee Concentrating Company, one of the complainants, had recovered judgment against the defendant prior to the filing of the bill ; that its recovery gave to the company a lien upon all the real estate of the defendant within the jurisdiction of the court ; that execution had been issued upon said judgment and had been returned unsatisfied; that other claims for liens and priorities of payment had been made by creditors of the defendant, both secured and unsecured ; and that many claims were made, the justice of which was doubtful, and many which were unliquidated. It therefore prayed the appointment of a special master to ascertain

the priorities of liens and the rights and claims of creditors generally, and report to the court his findings.

The court thereupon made an order requiring all the creditors of the defendant to file their claims in the office of the clerk by petition stating their amount and nature; and in July following it appointed the special master prayed, to determine the rights of the several creditors of the defendant, who had, in accordance with its previous order, filed their claims with the clerk, and to marshal the liens and priorities of such claims.

Among the claims filed with the clerk pursuant to this order was one presented by the Florence Mining Company, a corporation of Michigan, for an amount alleged to be due to it upon a contract with Brown, Bonnell & Company for the sale of certain iron ores."

If it had appeared to this court that it was disclosed by the allegations of the original and supplemental bills that the court below had no jurisdiction, it could not have recognized the right of the Florence Mining Company to recover anything whatever in that case from the assets of Brown, Bonnell & Company.

The further question remains, was the jurisdiction of the circuit court ousted by the payment of the Negaunee Concentrating Company's judgment, on December 24th, 1883, as shown by the record, page 11.

On this question I submit:

1st. That, because the jurisdiction of the court did not originally depend upon the fact alone, that one of the complainants had an unpaid judgment, its payment could in no way affect the jurisdiction.

2d. That, even if a judgment were necessary to be alleged, to give jurisdiction to the court, and the payment of such judgment would leave the court without jurisdiction, yet the payment of the Negaunee Concentrating Company's judgment, in this case was insufficient to affect the jurisdiction, because another judgment had been alleged by an intervening peti-

tioner, and the original relief asked for by the complainants in their bills was also prayed for by such petitioner. The judgment of the intervening petitioner supplied the formal support originally furnished by the Negaunee judgment, when the latter was removed by payment.

3d. That payment of the judgment did not oust the jurisdiction of the court below because the intervening cross-petition of The Commercial National Bank et al., which alleged a mortgage lien on the property of the defendant, had been filed by leave of court, prior to such payment.

4th. Because the theory of the bill was that all the creditors of the defendant, and particularly the two complainants, other than the Negaunee Concentrating Company, were in need of the protection given by a receivership, because their claims were not due, and attachments and seizures of the property had been made, and more were threatened, and that such threatened seizures and attachments, if made, would result in unjust preferences, and that the two complainants would be irreparably injured and without remedy at law.

The payment of the Negaunee judgment could in no way relieve these two complainants from their danger and therefore could not oust the jurisdiction of the court already acquired.

5th. Under the commonest principle of equity jurisdiction, if I am right in the first position, viz.: that the court had jurisdiction on the original and supplemental bills to appoint a receiver and take an account of the indebtedness of the defendant, and adjust and marshal the liens upon its property, even though the existence of a judgment was necessary to be alleged to give such jurisdiction, the court of equity having taken jurisdiction, would not, and properly could not, release it for any cause, until the rights of all the parties had been settled and protected. In this case more especially should the court have refused to yield up its jurisdiction, when it appeared that by doing so it would be aiding in, and forwarding the inequitable scheme of certain creditors to obtain

unjust preferences in the distribution of the property of the defendant, such scheme to be carried out through the instrumentality of a receiver appointed in another court. When a court of equity has obtained jurisdiction of a cause, it will not, when it can determine the matter, "be the handmaid to the other courts, nor beget a suit to be ended elsewhere."

6th. If the court originally had jurisdiction, because the property of the defendant insolvent corporation was a trust fund, it could never lose jurisdiction until the trust was executed, even though one of the many entitled to distribution were paid in full.

I do not deem it important to cite authorities in support of the suggestions made with respect to this second contention of the appellant, for I do not anticipate that it will be seriously urged at the hearing.

Other considerations and reasons suggest themselves as this argument progresses, why the action of the court below should not be pronounced a nullity, and the extensive and valuable property of the defendant be thrown among creditors, as a carcass among wolves, for physical dismemberment, and fortuitous and unequal distribution; but I am contented to rest upon the reasons given, supported, as they are, by such eminent authority.

The creditors as a unit ask that the action of the court below be sustained.

And who opposes them? Only the skeleton of a corporation, civilly dead, with no property that does not in equity belong to its creditors, urging contentions which, at most, pertain to matters of form alone.

And what can result of good to any if the appellant succeeds? Certainly nothing to the defendant, unless the distribution of the property or its proceeds to creditors unequally, instead of equally, can be productive of wrongful profit to it by some method of indirection.

Depending, confidently, upon the jurisdiction which must be conceded to the court of equity, in order that it may accom-

plish the objects for which it was originally created and has been maintained since first it was recognized, that a receiver should be appointed for the conscience of the king, among the most important of which is to enforce the execution of such matters of trust and confidence as are binding in conscience, although not cognizable in a court of law, I respectfully submit that the decree of the court below should be affirmed.

My brief had been completed to this point when the brief for the appellant was received. It will now be attempted, in as short a space as possible, to make some suggestions in reply to those urged by appellant, which must of necessity be less full than they would be if ample time and opportunity existed.

It is urged, on page 9 of the brief referred to, first, that the absence of adequate legal remedy was the original and characteristic test of chancery power, and that that doctrine has been unalterably fixed in the federal system of jurisprudence by statute, and cases are cited showing what the doctrine of federal courts must be in equity ; that suits in equity cannot be sustatined in any case where plain, adequate and complete remedy may be had at law. It is further urged that these restrictions on equity power are regarded as jurisdictional, and cases are cited.

Admitting, for the sake of the argument, that this proposition is correct, and is sustained by the authorities cited, yet we still come to the question, was it shown by the bill and supplemental bill filed in this cause that the complainants and those in whose behalf suit was brought, had a plain, adequate and complete remedy at law ?

It is said, on page 12 of the brief referred to : "The right of these three creditors to sustain the equitable jurisdiction and obtain a decree must necessarily be dealt with precisely as though each had filed a separate bill." And there is cited in support of this proposition the case of *Schwed vs. Smith, 106 U. S., 188*, and *Severs vs. Bigelow, 5 Wall., 208*. The correctness of this proposition, and also that it is supported by the citations, must be denied.

The two cases cited refer only to the appellate jurisdiction of this court on the question of amount involved.

In *Story's Equity Jurisprudence, 9th edition, sec. 99,* in speaking of the cases in which a few creditors may maintain a suit on behalf of themselves and all other creditors, the author says: "But a few creditors will not be permitted to bring a bill of this sort for an account and administration of assets, without saying in the bill that it is brought on behalf of themselves and all the rest of the creditors."

This statement of the text is authorized by the cases of *Leigh vs. Thomas,* 2 *Ves., 313,* and *Brown vs, Ricketts, 3 Johns. Ch., 553.*

It must then be true, that there is a difference between a single creditor bringing a suit in behalf of himself alone, and several of many creditors bringing the suit in behalf of themselves and all other creditors. If there is a difference, to the extent that one would not be permitted to sue for himself alone, where a few would be permitted to sue in their own behalf and in behalf of all others, it follows, necessarily, that the rights of each creditor of the few that sue in behalf of all are different, and must be dealt with differently, than they would be if each had filed a separate bill. And the reason for this distinction is apparent. In the case of a suit by a single creditor, the only question that arises is, shall this single complaining creditor be paid his claim out of the assets of the debtor, and is the interference of a court of equity required to enable him to subject such assets. In the case of a few creditors suing in their own behalf and in behalf of all others the question is, shall all of the creditors be paid out of the assets of the defendant, and in what proportion with relation to each other, and is the interference of a court of equity necessary in order that each of the creditors may receive out of the assets what is justly due him when the rights of all other creditors are taken into consideration.

Commencing on page 12 of brief for appellant, there are urged suggestions with respect to the *status* of a judgment

creditor; and further on, on page 21, a distinctive argument with respect to the *status* of the two creditors at large.

If I am correct in saying that the common right of the complainants and all the creditors of the defendant is different from the individual right of any single creditor acting for himself, then this distinctive analysis of the separate right of the judgment creditor and the two creditors at large is improper, and it is unnecessary to reply to the argument made by counsel under the different heads referred to by other arguments than have been made on the general subject of jurisdiction. This may be said, however; if it is admitted as stated in the brief, that a judgment standing alone constitutes no title to equitable aid, and that an ordinary creditor's bill, by a single creditor on a judgment, is maintainable only when it is shown by the return of execution *nulla bona*, that there is no remedy at law, such admission in no way affects the position taken by appellee with respect to jurisdiction in this cause. An examination of the authorities cited by counsel in support of this branch of his argument will show that they only refer to cases in which a single creditor was seeking to collect his judgment through the aid of a court of equity.

Reference is made under this head, by counsel for apellants, to the statutes of the state of Ohio, and it is said: "Nor is the ordinary equity jurisdiction aided by any local statutes of Ohio enlarging the remedies of creditors, or remitting the observance of the usual requisites to equitable aid."

Section 5587, Revised Statutes of Ohio, provides as follows: "A receiver may be appointed by the supreme court, the district court, the court of common pleas, or by a judge of either, or in the absence of said judges from the county, by the probate judge of the county in the following cases:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others *jointly owning or interested in any property or fund*, on the application

of the plaintiff, or of *any party whose rights to and interest in the property or fund, or the proceeds thereof is probable*, and where it is shown that the property or fund is in danger of being lost, removed, *or materially injured.*

"2. In an action by a mortgagee, for the foreclosure of his mortgage, and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.

"3. After judgment, to carry the judgment into effect.

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply the property in satisfaction of the judgment.

"5. In the cases provided in this title, and by special statutes, when a *corporation* has been dissolved, or is *insolvent*, or in iminent danger of insolvency, or has forfeited its corporate rights.

"6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

It will be seen by this quotation from the statutes, that the equity jurisdiction provided for in the courts of the state of Ohio is much broader than that contended for by the apellee, in the case under consideration. The provisions of the statute recognize the right in one who has only a *probable right* with others, jointly, in any property or fund, to have a receiver appointed, when it is shown that such property or fund is in danger of being materially injured. It provides *separately* for the appointment of a receiver to carry *a judgment into effect.* Without going into the question as to whether or not the statutes of the state, regulating the remedy of suitors in equity, establish such property rights in the suitor, that the federal courts will recognize and enforce them, I simply

make the quotation from the statutes to refute the statement made by counsel, above quoted.

Under the second heading referred to, it is stated in the brief for appellant, page 21, in referring to the two creditors at large: "When they brought this equitable action they were not even clothed with the right to institute a suit at law because none of their demands had become due or enforcible," and the argument proceeds upon the basis, evidently, that it is claimed by the appellee, that a single creditor without a judgment and with only a claim not yet due, can by a bill brought solely in his own behalf, sequestrate the property of his debtor. That is not the position of the appellee. But it is claimed, that in a bill of the nature of the one filed in this cause, the allegations that the claims of the two creditors at large were not due and that there were other creditors too numerous to be made parties by name, showed conclusively that, under the circumstances existing, of the insolvency of the defendant and of the existence of claims that were due and about to be enforced by process of law against the fund out of which all must be paid and which was insufficient to pay all, these two creditors, and all in similar situations, from the very fact that they could obtain no judgments, were without any *adequate* remedy at law.

It is said in *section 99 of Storry on Equity Pleading, 9th edition :* "Thus a few creditors may maintain a suit on behalf of themselves and all the other creditors of a deceased debtor against his proper representatives for an account and application of his assets, real as well as personal, in payment of their demands. And it seems that the doctrine equally applies, whether the suing creditors are creditors whose debts are then absolutely due, or the debts, although present debts, are payable in future. (*Debitum in presenti solvendum in futuro.*) Indeed, if the bill by a creditor seeks to affect or charge the real estate of the debtor with a debt in common with other creditors, the bill not only may, but ought to be brought on behalf of all the creditors, and not of himself alone."

On page 23 of the brief referred to it is said: "The vague averment in the bill that the defendant was 'insolvent' does not create any equity or charge upon the property or in any respect prevent the application of the principle which inflexibly denies the right of non-judgment creditors to equitable aid against a debtor's property."

In the light of the numerous authorities before cited in this brief, in which this court has made distinctions between the *status* of "solvent" and "insolvent" corporations, and in which always the designating adjective used by this court is the word "insolvent," it can hardly be correctly stated that the use of such word is in any sense *vague*. The undisputed allegation in the bill that the defendant corporation is *insolent* at once presents to the mind the condition of the defendant, owing debts and having insufficient property to meet them, and raises the inquiry, what court can enforce an equal distribution, other than a court of equity?

It is further claimed on page 24 in behalf of appellant, that "in granting relief on a bill in which creditors whose claims were not due, and therefore not ascertained by judgment, were interested, together with others, the court below not only disregarded the prohibition of the act of congress restraining equitable jurisdiction, but also invaded and destroyed the appellant's constitutional right of trial by jury."

Wherever there is a necessity of accounting between different claimants to a fund, as an incident to the doing of complete justice to all concerned, a court of equity has always had jurisdiction to determine the amount due to each, and had such jurisdiction prior to the adoption of our constitution. And it has never been held by this court that such accounting and ascertaing the amount of money due to each claimant was beyond the jurisdiction of a court of equity, or an infraction of the constitutional right of trial by jury.

On page 25 of the brief it is said: "Here the suit is against a debtor only, and the relief finally decreed to these complainants against it has no equitable characteristic what-

ever. It embraces but two elements: 1. A pecuniary judgment. 2. An execution against property plainly accessible to an ordinary writ of law to enforce satisfaction; it awards merely a common law judgment and process; no liens were enforced, *no equitable fund created*, fraud redressed, cloud removed or priority declared."

These are mere assertions that are plainly without foundation. The relief decreed to the complainants, who were the whole body of creditors, has clearly equitable characteristics, in that it does what no execution at law could ever do; that is, sell the property as a whole, and out of the proceeds pay to each his proportionate share. This is certainly something more than a pecuniary judgment and an execution against the property accessible to an ordinary writ. It provides for a distribution of the proceeds arising from the sale of the property of the defendant in a way in which no other court than a court of equity could provide. An *equitable fund* was created the moment that it was ascertained that the defendant corporation was insolvent, because nothing can be better founded in the numerous decisions of this court than that the property of an insolvent corporation is *a trust fnnd*, and that the creditors have *an equitable lien* upon it.

Under the third head the brief refers to the *status* of the creditors proving under the decree. All the argument under this head seems to be with the purpose of showing that, because the claims of these petitioning creditors were not such that suits at law could have been brought upon them, therefore there was no jurisdiction in the court of equity to protect the interests evidenced by them. And it is further objected that as to nearly one-half of the aggregate indebtedness it was secondary and wholly contingent, arising on the endorsement of the obligations of a third party, and none of this secondary liability had become established when the suit was brought, because none of the paper had matured; and an example is made of the claim of the Florence Mining Company, which, it is stated, was for damages for non-acceptance of iron ore

contracted for, and also on divers endorsements of the notes of J. V. Ayer's Sons, which matured in April, May and June, 1883. It is enough perhaps to say under this head, what has been repeated so many times in different form, that from the position of the appellee, because there were so many creditors having claims of different character, the most of which were not due, that it was the duty of a court of equity to take jurisdiction and to see to it that each of these numerous creditors had his equitable share of the property of the insolvent defendant; that each of these petitioning creditors was really an original complainant, as much as though his name had been set forth in the bill. What has been said with reference to the creditors at large not having judgment, applies equally to these petitioners.

In *Section 101 of Story's Equity Pleadings*, it is said: "But although one creditor may thus be permitted to file a bill on behalf of himself and all the other creditors; yet it has been said, that this is to be understood with this limitation, that the bill is not filed for any peculiar interest of the plaintiff; but it is one, where all the creditors have common interest with him in all the objects of the bill."

It was proper and necessary for the court to ascertain and adjust all these claims relatively, and, in doing so, it was bound to consider all claims whether due or not due, contingent or certain; in this full ascertainment and adjustment it in no way went beyond its jurisdiction or deprived any one of the right of trial by jury.

The next error assigned by counsel is that the court appointed a receiver and refused to discharge him, and under the first sub-head, on page 28, the proposition is stated: "The judgment creditor had adequate legal security, and therefore had no equity to obtain a receiver."

Neither the proposition nor the argument relate to the case under discussion, unless we admit that the premises of counsel are right, viz: that this suit was brought solely for the benefit of the judgment creditor. This is not admitted,

for reasons already given. It might be said, further, that the case heretofore cited of *Sage vs. Memphis Railroad*, is not in accord with the doctrine of appellant on this point.

Under the next sub-head 2, page 29, still further pursuing the Napoleonic method of attacking in detail, the further proposition is stated: "Creditors at large without lien or charge upon special property can not have a receiver."

We have just learned from the brief that a creditor having a specific lien upon the property could have no receiver appointed, because the property was abundant to pay him; and now, the judgment creditor being thus disposed of, we are told that a receiver could not be continued because there was *no* specific lien after payment of the Negaunee judgment.

Without emphasizing the inconsistencies of these propositions with each other, it is enough to say, that the argument still rests upon the improper assumption that the rights of each creditor must be considered as though he had brought a separate bill. As has before been said, if the court had jurisdiction originally to enforce the equitable lien of the whole body of creditors against the property of the defendant, and incidentally to preserve the property from loss and deterioration by appointing a receiver, such jurisdiction could not be ousted, by paying off one of the creditors.

It is further stated on the same page of the brief, that the order, granted concurrently with the filing of the bill, ousted the possession and instantly terminated the authority of the directors and officers of the company, who, under the laws of Ohio, were specifically vested with the power, and charged with the duty and responsibility of management, as completely as though the order of receivership had been a final judgment of ouster in a *quo warranto* proceeding.

Taking charge of the property of a corporation for the purpose of paying its debts, ratably, in no way affects its corporate existence; it no more deprives the officers and directors of their statutory prerogatives of control, than would the levy of execution, and no more applies to this case than it

would to any conceivable case in which the right to a receivership might be admitted. It can never be a valid objection to seizing the property of a debtor for the purpose of subjecting it to the payment of his debts, that thereby he is deprived of its control. The appointment of a receiver for the property of a corporation no more has the effect to destroy the corporation, after the manner of proceedings in *quo warranto*, than has the seizing of the property of a natural person, the effect to deprive him of life.

The statutes of Ohio have, as before seen, given power in equity to place property, in which many have a probable interest, in the hands of a receiver, and particularly the property of an insolvent corporation ; hence it is not true as stated on page 31 of the brief, "The state of Ohio has not enacted any statute authorizing such a procedure in a local court."

It is of no avail to appellant to assert and prove the proposition, "On general principles no receiver can be placed over property unless the plaintiff has some specific charge or lien thereon."

This court has repeatedly announced that the whole body of creditors, and each one of them, have a specific equitable lien upon the property of an insolvent corporation.

The cases cited on pages 32 and 33 of the brief relate to actions by a single creditor against his debtor, or those assisting the debtor to dispose of his property in alleged fraud of the rights of the creditor.

These citations in no way apply to the question of what may be done against trustees, or the property held in trust by them, when it is shown that they are either incapable, or unwilling to execute their duties as trustees.

And therein lies the distinction which should be made. It is universally held by this and other courts, that property of an insolvent corporation can be followed into the hands of any one, other than a *bona fide* purchaser, by the creditors ; it follows, as a corrolary, that if there is a threatened disposition of the property of an insolvent corporation, by its offi-

cers, to others than *bona fide* purchasers, such disposition can be enjoined. It is held a fraud against creditors for the directors of an insolvent corporation to prefer themselves as creditors; if an intention to do this were known in advance, the corporation and its officers could be enjoined. And this is held, not in defiance of, or in conflict with, the rule laid down in the cases cited in the brief, such as *Adler vs. Fenton, 24 Howard, 411*, but in enforcement of the doctrine of the trust character that attaches to the fund or property of a corporation after insolvency has intervened.

That a trustee can be enjoined from disposing of the trust funds, in violation of his trust, must always be recognized. But counsel for appellant attempts in his brief, on the pages referred to, to establish the converse of this proposition by showing from authorities, that an individual, not a trustee, cannot be enjoined.

No attempt was made in the case we are discussing, to enjoin any one from doing anything, but simply and only, by appropriate and necessary remedies, to preserve trust property and enforce the trust.

On page 34 of the brief, under this same general head, it is furiher stated as a proposition upon which reliance is placed by appellant, that "the grounds on which the receivership was granted were inadequate."

The position, that the court had no *jurisdiction* to appoint a receiver, is at this point abandoned; and it is objected that insolvency and threatened seizures of the property to the advantage of certain creditors and irreparable injury of others, are inadequate to move a court of equity to take such measures as are necessary to preserve the property and to secure an equal distribution.

There is presented by these facts a recognized *right* in equity and an admitted *danger:* it must be admitted that usually these are adequate to support the action of the chancellor, at least to the extent that what has been done in his discretion, is not to be regarded as a nullity.

It is rightly stated in the brief, that it was designed by the bill and the receivership to place all the property beyond reach of legal process and remedies; to give to the court the custody of the property, because in its hands it would be no longer subject to levy or attachment. And while it is true that equity recognizes the doctrine of diligence, under proper circumstances, it is equally true that it does not recognize as diligence, or in any way encourage, undue haste to get an unfair advantage. In law it would be great lack of diligence for one to fail to set up a counterclaim or offset against a claim prosecuted in behalf of an insolvent corporation, and yet this court, in *Sawyer vs. Hoag*, did not recognize or excuse such a course as proper dilligence, but, on the contrary, prohibited it as inequitable.

The distinction between trust and other property is again overlooked by counsel.

The next assignment of error appears on page 37. It is said: "The order taking the supplemental bill as confessed and proceeding to decree thereon, was error."

It is objected that no leave was obtained, on notice and good cause shown, to file the supplemental bill, and that when a complainant relies on a decree *pro confesso* he should be held to a strict compliance with the equity rules, and a material non-observance on his part will avoid his decree.

In answer to this it can be said:

1st. Any informality attending the filing of the supplemental bill was waived by the defendant, by filing its plea after the *pro confesso* was taken.

2d. The decree in this cause is not a *pro confesso* decree.

The decree itself recites: "At this February term, A. D. 1886, this cause came on to be heard upon the pleadings, the report of the special master in this cause as confirmed by the court, the reports of the receiver to this court, *exhibits and testimony and was argued by counsel.*"

See page 38 of Record.

On page 39 of the brief the further error is assigned that

the order of administration entered April 23, 1883, requiring all creditors to file their claims in court was premature and erroneous.

The order for creditors to file their claims was an order affecting creditors alone, and cannot be the basis of complaint by the defendant.

Creditors had a right, without the order, to file petitions under the allegation in the original bill, that suit was brought in their behalf; the order only specified the time and manner of filing, and the penalty to them for not filing. The order in no way changed the character of the suit; it was, from the beginning, a suit of *all the creditors* against the property of the defendant.

On page 40 of the brief the next objection is made that the pleadings are not sufficient to support the decree as rendered and, specifically, because "the final decree gave judgments *in personam* against appellant, in favor of the two original plaintiffs holding promissory notes, for their whole demand. When the supplemental bill was filed March 28, 1883, some of their notes had not then matured. No later pleading was filed."

This latter statement is incorrect.

On page 251, addition to record, it is shown that on June 21, 1863, both The Lake Superior Iron Company and The Jackson Iron Company filed their petitions describing their claims in accordance with the order made to creditors.

The other objection made under this head is that neither the original nor the supplemental bill described the property.

The only purpose of accurate description of property in the bill would have been for the benefit of third parties. The defendant was sufficiently informed of the precise nature of the equity it had to meet, when it was prayed that all its property of whatever nature, and wherever found, should be put into the hands of a receiver and ultimately sold for creditors. If property other than that belonging to the appellant has been

ordered to be sold, the person owning such property is the proper objector, and not the appellant.

If the property described in the decree includes all the property of the appellant, it cannot be said that the decree does not come within the specific prayer of the supplemental bill.

It has already been seen that the defendant filed its plea to the supplemental bill, and thereby waived all absence of a rule to plead, and therefore the claim of appellant cannot be maintained, that the final decree must be tested solely by the scope and prayer of the original bill.

It is next objected, on page 43 of the brief: "The proceedings in the master's office were not conducted according to proper practice. His report shows that it was based on incompetent proof taken without notice."

In answer to this objection it is submitted:

1st. That it nowhere appears that the master's report was based on incompetent proof, and that it is not correct, as stated in the brief, page 48, that: "It also plainly appears upon the face of the master's report, that, except in a few instances where the receiver, (who was not vested with any such power by the order of appointment), contested the amount of the claim, the finding was based upon the verified petition of the creditor." On page 34 of the record, in the report of the master it appears as follows: "In accordance with this order, I caused, in each case in which the receiver made any contest as to the amount due upon the petition of the creditors, proper pleadings to be filed, and upon the issues so made I have heard such testimony as the parties produced, and made in every such case a special report as to the amount allowed, with reasons for such findings. * * * In very many other claims, after comparing the proofs filed by the petitioners *with the books of the defendants and records on file in this office*, I was enabled to reach a conclusion satisfactory to the creditor, to the receiver representing the defendants and to me, and in such case I have not filed any special report,

but made a finding of the amounts on the schedule hereinafter referred to."

This reference shows that the report was based on evidence other than the verified petitions of the creditors, viz: the books of Brown, Bonnell & Company and records on file in the office. It does not appear that any incompetent proof was heard, and it nowhere appears that the verified petitions of creditors were admitted as evidence; these petitions "were compared with the books of the defendants."

2d. All of these petitions of creditors were on file when the plea of the defendant was filed, Nov. 24, 1883. Record pages 9 and 10. This appearance and filing of plea by defendant waived notice of the fiiling of any petition in behalf of complainants or creditors up to that date. The report of the master was not filed until June 24, 1884.

Neither the report of the master nor the decree of the court were entered on default. It is not therefore necessary that it should appear affirmatively that process was issued or notice was given. It does not appear that notice of the hearing of evidence on the petitions of creditors was not given.

The report of the master not being excepted to and being confirmed by the court, it is to be presumed that he proceeded regularly, and that if notice was necessary or proper to be given, it was given.

The decree recites that it was entered *after argument by counsel.* These matters of objection to the master's report should have been made by exception before the decree was entered.

It is true as quoted from Bacon's Ordinance, on pages 47 and 48 of the brief: "No decree bindeth any person who was not served with process *ad audiendum judicium* according to the course of the court, *or did appear in person in court.*" But defendant did appear in court, both prior to and at the entry of final decree.

To meet the next objection under this head, viz: that

petitions of creditors were verified before notaries public, it is perhaps enough to say, that if the petitions are not evidence of claims, it is of little consequence in this controversy, at this stage, to enquire before whom they were verified; the allegations contained in them have been found to be true or otherwise, by the master and the court, upon evidence adduced.

It is further objected by appellant, at the foot of page 49 of the brief, that many of the claims of creditors rested entirely upon the contingent liability of appellant as endorsers of paper maturing after suit brought. The petition of the Greenville National Bank (addition to record, pages 252-3) shows the "general character" of the petitions filed by other creditors.

It is claimed by counsel for appellant that because there is no averment of notice to appellant of non-payment, the petition as a declaration at common law would be insufficient to support judgment.

Sec. 3176 of the Revised Statutes of Ohio, referred to, provides "that a demand of payment * * * *, on the third day of grace * * and notice of non-payment thereof to the endorsee * *, within a reasonable time thereafter shall be adjudged *due diligence*."

The averment contained in the petition of the Greenville National Bank with respect to the notes set forth, is that such notes were duly presented at said Union National Bank on April 17, 1883, and demand being made and payment being refused were "*duly protested*."

By sec. 119, Revised Statutes of Ohio, the duties of a notary public with respect to commercial paper are referred to, as presentment, demand, notice to drawers and indorsers and *protest*. According to all commercial usage, the protest is the doing and recording of all that is proper under the circumstances.

The allegation that the paper was duly *protested* is equiva-

lent to saying that demand was made, notice of non-payment sent and a record made of these doings.

"The words 'protest waived' written over the name of an endorser of a promissory note are held to be a waiver of *all the steps required by law to fix his liability.*"

McIlvain vs. Bradley, 1 Disney 94.

Story on Promissory Notes, Sec. 271, 6 Wheaton, 274; 8 Greenl., 213; 4 Pickering, 525; 11 Wend., 634.

It may also be said of this objection, that the time and way to have raised the question was by exception before the confirmation of the master's report. After appearing against the entry of the decree without objection to the master's doings, it is too late to take advantage of errors made by the master, if there were any such.

On page 17 of the brief it is again urged that the decree is not justified by the pleadings and prayer for relief, and some of the arguments previously made in support of the same proposition are repeated. An additional reason is given, in effect, that under sec. 659 of Revised Statutes, U. S., the burden is upon the appellee to see that a full record is transmitted to this court, and his omission to do this is equivalent to error in the record.

This is asserting the doctrine, that unless a full record of testimony taken in behalf of a complainant is brought up to this court by the defendant and appellant, the decree in favor of complainant will be reversed instead of the appeal dismissed. This doctrine is new and strange. It certainly is not supported by the cases cited.

The certificate of the clerk in this record does not show that a full transcript of the record and evidence below is transmitted. If the appellant asks reversal on the ground that the decree is unsupported by proof, he must predicate such claim upon a certificate that all the proof taken is in the record, as would be required in a bill of exceptions in proceedings in error.

It is expressly said in Blease vs. Garlington that "a case will not be sent back to have rejected testimony taken."

While it is true, that all testimony, whether oral or not, should be made a part of the record below; yet, if an appellant chooses to bring his case to this court on a transcript which does not purport to set out all of the record, he should not ask reversal on the ground that sufficient testimony does not appear in the *transcript* to support the decree.

If the rule contended for were adopted, every appellant would have it in his power to get a reversal of a decree against him by the simple process of bringing up an incomplete transcript.

On page 56 of the brief it is objected that the decree improperly directed the sale, in one parcel, of real estate and personal property. The argument seems to proceed upon the theory that a court of equity cannot order property to be sold in any other way than it could be sold on a judgment at law.

This is unsound.

The decree first directs what shall be sold; that is, the real estate and personal property described; and as to the *manner* of conducting the sale, directs that it be conducted as upon a judgment at law.

The laws of Ohio with respect to sales upon execution have nothing to do with the question of sale, except to the extent that the order of sale has adopted them.

On page 58 of the brief, the argument is continued under the formulated objection: "Contrary to the settled equity practice and also to the Ohio statutes, the decree erroneously ordered the sale of appellants' real estate before its personal property was exhausted."

The theory of the bill and decree is, that the court is called upon to execute a trust.

It will be readily admitted by counsel for appellant, that before the appointment of the receiver, and after the defendant had become insolvent, Brown, Bonnell & Co. and its officers would have had a perfect right, as trustees, to sell

under one contract the whole property, real and personal, under their control, for the purpose of raising a fund out of which to pay creditors. If such sale were honestly made, for an honest price, no one could criticise the conduct of the trustees who made it. The court has full power to do what the defendant and its officers could have done, by way of executing the trust. Neither the laws of Ohio nor the practice in equity, in any way, hinders the court of equity in enforcing its decree in the way in which the equities of the cause require. From the beginning of the suit it was considered, that the property and business of the defendant should be preserved as a whole, and ultimately sold as a whole. This has been done. The sale of a railroad property is made as a unit, because it is more valuable as a unit, and consequently will bring more when sold in that way. The same reasoning applies to the property of the defendant. Neither statutes nor equity practice make any special methods applicable to sales of railroad property that are not equally applicable to property of all other corporations similarly situated.

The cases cited, such as *Gormley vs. Potter, 29 Ohio State, 597*, relate only to suits in which the court of equity is asked to aid the judgment creditor by setting aside fraudulent conveyances and obstructions made by the debtor, in order that the creditor may be enabled to collect his judgment.

In the last case cited the decision of the court as shown by the syllabus is: "Whether the debtor, on the making of the conveyance, retained sufficient property to satisfy his creditors, is a proper subject of inquiry in determining the character of the conveyance. But if the conveyance is found to be fraudulent as to creditors, neither the debtor nor the fraudulent grantee can require the creditor to abandon his levy, on the ground that the debtor has other property which might have been taken by the creditor; nor is it necessary that the petition should aver that the debtor had no such other property."

Inspection shows that the citations are in no way appropriate.

Neither can the claim for appellant, that no sale in equity can be valid to pass title unless by virtue of a specific lien founded upon a levy or mortgage, be sustained by authority.

If the complainant has an equitable right to have property subjected and applied to the payment of his claim, equity will subject it and apply it by sale if necessary.

The whole contention in behalf of complainants in this cause is that the creditors have a lien in equity upon the property and assets of the defendant. If they have such a lien it is as valid to furnish the foundation for a conveyance of property sold under the order of the court as would be a levy of execution or a mortgage duly executed. It is within the power of the court to direct conveyance by the defendant, after sale, to carry into effect the decree.

The subjection of the assets of an insolvent corporation to the payment of its debts, is not a winding up of the corporation in any sense. And the objection that courts of equity have no power to administer bankruptcy proceedings or to "wind up" the appellant, is not pertinent. It is admitted by counsel for appellant that a court of equity can appoint a receiver and sell out all the property of a corporation under a bill that alleges that execution has been issued and returned *nulla bona*. Would not such a course be equally a "winding up proceeding" as much as the sale of property contended for by complainant?

The only thing done in either case is to subject the property by sale.

I can not find in *Hawkins vs. Glenn, 131 U. S, 319*, the quotation made in the brief for appellant on page 73.

It is said in that case, however, by way of quotation from the Supreme Court of Appeals of Virginia, which interprets a statute of that state: "By which it is provided that notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while alive and going, and may sue

and be sued as before, and that the directory has assigned to trustees, alters the case only so far as to make the trustees necessary parties."

This decision, being by the highest tribunal of the state, interpreting a statute in reference to which stockhslders contracted, is concurred in by this court.

It is difficult to see what possible bearing on the case at bar the citation has.

The case of *Mellen vs. Iron Works*, in the same volume, page 352, is important and instructive in this discussion. It affirms fully the trust doctrine contended for by appellee; and also the doctrine before referred to, originally announced by Mr. Justice Bradley, in *Graham vs. LaCrosse & M. R. Co.*, that: "Where a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stotkholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances are as much the absolute property of the corporation as any man's property is his."

Mumma vs. Potomac Co., 33 U. S., 8 Pet., 281.

Morgan County vs. Allen, 103 U. S., 498.

Wabash, St. L. & P. R. R. Co. vs. Ham., 114 U. S., 587.

2 Story Equity Jur., sec, 1252.

1 Perry Trusts, sec. 242.

The doctrine announced in *Catlin vs. Eagle Bank, 6 Conn., 233*, and in *Pondville Co. vs. Clark, 25 Conn., 97*, have long since become obsolete.

The doctrine of the latter case, that after insolvency a stockholder who had given his note in payment of his stock subscription, could offset a debt due from the corporation, is expressly denied by this court in *Sawyer vs. Hoag.*

The cases are no longer regarded as respectable authority.

Morawitz, sec. 582, 1st edition, says, in speaking of the doctrine announced in *Dana vs. Bank, 5 W. & S., 233*, cited by appellant: "It is submitted that this doctrine is wholly

indefensible upon principle. It seems to have been first started in *Catlin vs. Eagle Bank*, a case in which the fundamental rule, that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors, was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and it is contrary to the plainest principles of justice."

See also *Robins vs. Embry, 1 Sm. & M. (Ch.) 207, 258, 264.*
Richards vs. New Hampshire Ins. Co., 43 N. H., 263.
Hightown vs. Mustian, 8 Ga., 506.

It can no longer be said that the idea of a trust, with respect to property of an insolvent corporation, is vague, nor that its announcement and enforcement "is taking leave of every established principle and beating the air."

The doctrine is as well settled now as any principle of jurisprudence can be, and the only question really in this discussion is, has it been properly applied by the court below? And that question involves, only, the further question, was the return of execution unsatisfied necessary to be alleged to to give the court jurisdiction?

FRANCIS J. WING,
Solicitor for Appellee.

Supreme Court, U.S.
FILED.
MAR 20 1890
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

No. 227.

BROWN, BONNELL & CO., Appellants,

vs.

THE LAKE SUPERIOR IRON COMPANY, THE JACKSON IRON COMPANY, and THE IMPORTERS' AND TRADERS' NATIONAL BANK OF THE CITY OF NEW YORK,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEES.

By C. C. BALDWIN,
SAMUEL SHELLABARGER,
J. M. WILSON,
C. D. HYNE,
For Appellees.

Press of Thomas McGill & Co., Washington, D. C.

IN THE

Supreme Court of the United States.

BROWN, BONNELL & COMPANY,
Appellant,
vs.
THE LAKE SUPERIOR IRON
COMPANY ET AL.

No. 227.

Appeal from the Circuit Court of the United States for Northern District of Ohio.

Brief for Appellee.

FACTS.

The appellant, Brown, Bonnell & Co., was a corporation under the laws of Ohio, conducting a rolling-mill at Youngstown, in that State, a furnace at Struthers, near by, and making coke for its use in Pennsylvania.

We will, in this brief, designate the first Record, having 54 pages, as "1 R," and the second Record as "2 R."

A receiver of its property was appointed February 20, 1883, by the U. S. Circuit Court at Cleveland. (1 R., 5.)

The appeal is from a decree made in February, 1886, (1 R., 38,) in which that court ordered its property in Ohio to be sold, to pay, first, a lien of Wilcox & Scaife,

therein ascertained, (1 R., 50,) and the balance to be paid *pro rata* to general creditors, whose debts were also found therein; the debts, in the decree, amounting in June, 1884, to $1,320,649.92. (1 R., 35, fol. 70.)

The appellees sued for themselves and *all creditors*, (1 R., 1, fol. 2,) and their counsel, in fact, represent in this court over nine-tenths of all the claims of the creditors.

There was no contest by Brown, Bonnell & Co. over the amount of these debts, but the objection made is that the court should have discharged the receiver. (1 R., 9 and 10.)

There were five main pleadings in the suit, to wit:

1. An original bill, filed February 20, 1883. (1 R., 1.)

2. A supplemental bill, filed March 28, 1883. (1 R., 3.)

3. A cross-bill, or intervening petition, filed December 1, 1883, by the Commercial National Bank, John Hay, and Samuel Mather, (1 R., 11, and 2 R., 34,) as executors of Amasa Stone; Charles A. Otis, Dan P. Eells, and William H. Harris.

4. Answer to cross-bill, (1 R., 30,) and

5. Pleas of defendant. (1 R., 9.)

A decree *pro confesso* was rendered September 11, 1884, on the said answer and cross-bill, (1 R., 6,) and a decree *pro confesso* on June 14, 1883, on the said original and supplemental bill. (2 R., 21 and 22.)

So that, whatever averments are in any of these bills and cross-bills are confessed by defendant. These averments, so confessed, are, also, very fully proved.

The printed Record (in two pamphlets, which we designate, as aforesaid, as 1 R. and 2 R.) is quite confused, from the fact that appellant selected and had certified only such portions of the Record as he pleased.

A motion to dismiss for want of Record was made. This

ended in a stipulation, (2 R., 1,) by appellant's counsel, to furnish other stipulated parts of the Record.

He failed to do this, and caused to be printed only such matters as he at first selected; and the stipulated part was afterwards furnished by appellees.

This suit was commenced February 20, 1883. Brown, Bonnell & Co., an Ohio corporation, as before stated, had a capital stock of a million and a half of dollars. (Matthews, 2 R., 172.)

Its president was Herbert C. Ayer, resident in Chicago, doing an iron business there, (Jones, 2 R., 143,) under the name of John V. Ayer's Sons, and of which nominal firm he was the only member. (Matthews, 2 R., 156.)

(NOTE.—Called, *passim*, by error, John B. Ayer's Sons, and by clerical error in one of the reports H. C. Ayer is named as John B. Ayer. It is stated clearly in the testimony of Matthews, late secretary, (2 R., 56,) and in the intervening petition of the Commercial National Bank *et al.*)

Almost all the product of the corporation was shipped on orders sent by Mr. Ayer, under the name of John V. Ayer's Sons, and on time paper, made by him, (2 R., 156, 157, and 158, Matthew's,) so that, in January, 1883, Brown, Bonnell & Co. was liable on $800,000 of the paper of John V. Ayer's Sons, taken by it and discounted for it, and owed, besides, $400,000 to $500,000.

Herbert C. Ayer also owned $1,000,000 (two-thirds) of the capital stock, thus controlling the corporation, and the business was managed by him, a directors' meeting being a rare event, only two in a year. (2 R., 130, 132, 156, 157, 161, and 164.)

On the 17th of February, 1883, Herbert C. Ayer, of John V. Ayer's Sons, hopelessly failed, (2 R., 157 and 158,) and the enormous debt he owed Brown, Bonnell & Co., and for which it was liable as indorser of $800,000,

is included in the debts for which decree below was rendered. (2 R., 158.)

Brown, Bonnell & Co. thereupon immediately, February 20, 1883, (2 R., 169,) confessed, in the U. S. Circuit Court at Cleveland, a judgment, in favor of the Negaunee Concentrating Company, for $5,110.40. (1 R., fol. 2.)

On the same day that company and two other appellees filed, in that court, the original bill of complaint herein. (1 R., 1.)

Brown, Bonnell & Co. immediately entered an appearance, and accepted notice, for the purpose of having a receiver appointed. (2 R., 7, and 1 R., 5, fol. 12.)

(NOTE.—This entry of appearance itself is omitted in appellant's meager original Record, though the fact of such voluntary appearance is stated. (1 R., fol. 12.)

The original bill of complaint is on page 1 of first Record, and a supplemental bill, filed March 28, 1883, is on page 3 of first Record; a synopsis of which may also be found in the opinion of Mr. Justice Field, in the suit of Florence Mining Co. *v.* Brown, receiver, in 124 U. S. Rep., 385 and 386.

Mr. Fayette Brown was appointed receiver on the same day, (February 20, 1883,) and immediately took possession. (1 R., 5.)

April 23, 1883, the court ordered that all creditors of Brown, Bonnell & Co. file their claims in the clerk's office of said court, by petition. (2 R., 12.)

June 14, 1883, a *pro confesso* was entered (2 R., 21) against Brown, Bonnell & Co. as to the original and supplemental bills.

July 17, 1883, the cause was referred to Augustus J. Ricks (now United States judge in said district) as master. (2 R., 22.)

Under these orders, commencing May 9, 1883, (2 R.,

250,) and continuing to October 20, 1883—one only being thereafter filed on February 21, 1884, and which was rejected (1 R., 38)—were filed many petitions of creditors, the amount of which appearing in the decree was over $1,300,000, of which, as before stated, much the larger share was paper made to the company by Herbert C. Ayer under the name of John V. Ayer's Sons.

Mr. Ayer, the bankrupt who caused this failure, who was, and still is, controlling the corporation by his ownership of stock, worse than worthless on account of the stockholders' statutory liability, on the 20th of October, 1883, gave to Mr. Henry Crawford a broad power of attorney in behalf of Brown, Bonnell & Co. (1 R., 19, and 2 R., 50.)

Under this, "pursuant to a fraudulent design in giving preference to certain of said creditors of Brown, Bonnell & Co. without the authority of its stockholders and board of directors, did, on or about the 23d day of November, 1883, (really November 22; see 2 R., 104,) appear before the Court of Common Pleas in said State of Ohio, and by his confession, thirty-three judgments were entered against said corporation, amounting to $570,806.69," &c. (1 R., 19, and 2 R., 41, fol. 68.)

Intervening petition of Commercial National Bank *et al.*, mortgagees, (1 R., 19; 2 R., 41,) was entered *pro confesso* (1 R., 6, and 2 R., 213) as against Brown, Bonnell & Co., who made no contest against the mortgage, although other creditors did. (1 R., 30.)

To give appellant the full benefit of what it claimed, (though there is no pleading to that effect,) it may be stated that at a stockholders' meeting of Brown, Bonnell & Co. (2 R., 172) held in January, 1884, the action of Mr. Ayer and Mr. Crawford was approved by a majority vote of the stockholders; as well it might be, since the fact then was that two-thirds of the stock was owned by Mr. Ayer, and *Mr. Crawford voted it.*

A *pro confesso*, as already stated, having been entered, on the original and supplemental bills, and preparation in advance made, by means of said confession of judgments, there was thereupon paid into court (1 R., 10) the amount of the judgment of the Negaunee Concentrating Company; and on November 24, 1883, (1 R., 10,) the appellant, by Mr. Henry Crawford, filed, (1 R., 9 and 10,) without any leave for that purpose, a plea setting forth, in substance, the payment of the judgment, and that the complainants (there were three suing in behalf of themselves and all others) had a plain, adequate, and complete remedy at law, and the court had no jurisdiction over the subject-matter of the action, or lawful power to make any decree. (1 R., 9 and 10.)

On the same day the Citizen's National Bank of Pittsburgh, (2 R., 28,) the Importers' and Traders' National Bank of New York, (2 R., 32,) and the Rossie Iron Works of New York applied to become complainants, and filed pleadings, (2 R., 13, 29, and 31,) leave being granted November 26, 1883. (2 R., 32.)

On the same day, also, John Hay and Samuel Mather suggested the death of Amasa Stone; (already a defendant on supplemental bill;) that they were the executors of his estate, and asked leave to answer. (2 R., 30 and 31.)

On December 1, 1883, (2 R., 33, fol. 54,) was filed the intervening petition and answer—leave to be considered intervening petition praying affirmative relief (2 R., 63)—of John Hay and Samuel Mather, as executors of Amasa Stone, deceased, and of the Commercial National Bank, Charles A. Otis, William H. Harris, and Dan. P. Eells. (2 R., 34.)

For present purposes it is sufficient to say that this petition was based on undisputed debts of these several petitioners, who were all respondents to the supplemental

bill, save the Commercial National Bank, a new respondent.

A report of the special master, (Ricks,) filed May 2, 1885, (2 R., 73 and 74, fol. 124,) found in favor of the respondents and cross-petitioners (whose answer and cross-petition begin on page 11 of 1st Record) that they were entitled to priority of lien in virtue of the mortgage set up in said cross-petition, as follows:

The Commercial National Bank of Cleveland for	$63,720 88
Dan. P. Eells for	40,052 44
W. H. Harris for	40,029 18
Charles A. Otis for	53,208 33
John Hay and Samuel Mather, executors of Stone	40,049 27
Making an aggregate of	$237,060 10

(See 2 R., 73 and 74, fol. 122, 123.)

The court on the 24th of September, 1885, (1 R., 33,) on exceptions to said report of master, filed May 2, 1885, (2 R., 215,) found the *facts set forth in said report of the master to be true*, but that the parties holding under said mortgage and claiming under said cross-petition did not acquire a lien or priority under such mortgage over other creditors, and as to said matter of priority sustained said exceptions, and set aside the report, but ordered that said intervening petition, so far as it sought to enforce said priority, should be dismissed, but retained for such further relief and protection as said intervenors might be entitled to. (1 R., 33.)

Said cross-complainants and intervening petitioners (1 R., 11) further claimed to hold as collateral the bonds of Brown, Bonnell & Co. of $5,000, each secured by mortgage on its plant, as follows: The Commercial

National Bank, thirty bonds, $150,000; and the other four, sixteen bonds each, being to each $80,000; and in all, $470,000. (1 R., 20.) The mortgage was dated April 3, 1882, (2 R., 34 to 60,) and was recorded February 17, 1883, in response to a telegram from H. C. Ayer. (2 R., 182.)

But few of the creditors' petitions are in the Record. (See 2 R., 1.)

The Manufacturers' and Traders' Bank of Buffalo, a citizen of New York, sets up a judgment in its favor by the U. S. Circuit Court, at Cleveland, April 25, 1883, for $9,973.78. (2 R., 20 and 21.)

So, also, the Rossie Iron Works, a citizen of New York, (2 R., 13,) and the Greenville National Bank, a citizen of Pennsylvania. (1 R., 252.)

The Florence Mining Company, a citizen of Michigan, in quite a full petition, filed May 29, 1883, (2 R., 15 and 19,) claimed $172,500, of which $42,571 was for damages for non-fulfillment of a contract. The report was partly in favor and partly adverse, and November 21, 1883, the company excepted. (2 R., 25.) The report was confirmed by the Circuit Court, and this decision was affirmed by the Supreme Court of the United States, in the case already mentioned, in 124 U. S. Rep., 385.

All matters outside of the United States court being now "fixed" to the satisfaction of Mr. Ayer, on the 18th of December, 1883, Brown, Bonnell & Co. filed a motion to discharge the receiver, for the reason (1 R., 10)—

"1st. That said court has no jurisdiction over the subject-matter of this controversy, and no jurisdiction to appoint a receiver.

"2d. Because on November 24, 1883, the said judgment of the Negaunee Concentrating Company was fully paid and discharged, together with all costs, by payment of the full amount thereof, to the clerk of this court, as duly appears of record."

The matter was heard on this motion, and, on the 24th of December, 1883, it was overruled. (1 R., 10 and 11.)

The priority of the lien of the said cross-petitioners (1 R., 11) was contested by other creditors, Brown, Bonnell & Co. first appearing by joining in exceptions to the master's report. (2 R., 215–217.)

The master's report, as already remarked, found the cross-petitioners entitled to a prior lien, (2 R., 73, 74,) but the circuit judge set aside the report, so far as it maintains a lien and priority in favor of the intervenors over other creditors. (1 R., 33.)

On the 23d of February, 1886, the court entered the decree appealed from, (1 R., 38,) finding due to creditors $1,320,649.92, as of the 1st of June, 1884. (1 R., 38.)

It was found that Wilcox and Scaife had a first lien on the plant. The plant was ordered sold, Wilcox and Scaife first paid, and other creditors *pro rata*.

Recapitulation of Facts.

We confine this brief to the merits of the questions raised by the appeal of Brown, Bonnell & Co. (1 R., 53, 54) from the final decree of February, 1886. (1 R., 38.)

The facts which control the merits of this appeal are not numerous or complicated.

They may be recapitulated as follows:

1. Brown, Bonnell & Co., appellant, is a corporation created under and by the laws of Ohio, and existing there as a corporation controlled by Ohio laws.

2. The original bill in this case was one filed by creditors of said corporation, on the 20th of February, 1883, in behalf of themselves and the other creditors of the corporation, one of the complainants, to wit, the Negaunee Concentrating Company, being a judgment creditor, and

the other creditors, so suing, held claims, one of which was due on the said date of filing the original bill, to wit, February 20, 1883; (1 R., fols. 1 and 2;) the claims of the other complainant creditors were not then due, but fell due soon after.

3. At the time of filing said bill the said corporation was deeply insolvent.

4. The business of the corporation was very large, and scattered through several of the States, and consisted, according to the averments of the bill, of the carrying on of the manufacture of iron, blast furnaces, rolling-mills, coke works, coal and coal mines; the plant was very large and valuable; the good-will and business of great value; employed hands amounting to at least four thousand; insolvency so great that numerous suits were commenced and threatened; this accompanied by attachments and seizures of property; such suits and seizures resulting in undue and unfair priority in favor of attaching creditors as against complainants, and resulting in irreparable damage; was great danger that such suits would destroy the business and property of the defendant, including good-will, and would break up the business, resulting in irreparable loss to creditors; that unless the court interfered to protect and preserve the property, by placing it in the hands of a receiver, the property would be in danger of destruction and dissipation; hence, prayer for receiver.

This is the substance of original bill. (1 R., 3 and 4.)

5. The supplemental bill, filed March 28, 1883, (1 R., 3,) by the same complainants, avers substantially as averred in the original bill, but adds that the property is of a *peculiar* nature; that irreparable loss and unjust preference between the creditors would be experienced unless the property should be preserved as an *entirety* by

a receiver, acting under the court; that the said Negaunee Company had, prior to the original bill, recovered a judgment which gave that company a lien on the real estate within the jurisdiction of the court; that, since original bill filed, execution had issued on said judgment, and returned unsatisfied; that other claims of liens and priorities are threatened by certain creditors against the property; that the creditors, secured and unsecured, are very numerous; many claims set up are of doubtful character, and many just claims unascertained as to amounts; that certain of the stockholders (who are named) reside within the jurisdiction of the court, and are asked to be made defendants; also asks that a special master be appointed to ascertain priorities of lien, to adjust and determine rights of claimants whose claims are disallowed by receiver, such master to make report; that the receiver be directed to send copies of decree, in this behalf, to every known creditor, and notify creditors, by mail, that if they wish to participate in the benefit of the decree they must file their claims within a time fixed by the court; and that receiver be directed to sell the property, and hold the proceeds subject to the order of the court, &c., &c.

A substantially full statement of the character of this case and of these pleadings is made in the opinion of this court by Justice Field in the case of Florence Mining Company *v.* Brown, 124 U. S., 385.

6. All these facts are by Brown, Bonnell & Co. confessed, not only by failing to make any answer whatever to either the original or supplemental bills, but, also, by the fact that they promptly entered their appearance, (1 R., 5, fol. 12,) and allowed decrees *pro confesso* to be entered upon the said original bill and the supplemental bill. (1 R., 6; 2 R., 21, 22.)

7. The answer and cross-bill of the Commercial National Bank, (1 R., 11,) setting up an amount of indebtedness, and the mortgage securing the series of five-thousand-dollar bonds, &c., &c., as above stated, was filed (1 R., 11) December 1, 1883. (1 R., 30.) To this cross-bill certain creditors (named at 1 R., 30) filed an answer March 1, 1884. (1 R., 30, 33.)

8. On the *24th of November, 1883*, by Henry Crawford, Brown, Bonnell & Co. entered the two *pleas*, (found 1 R., 9,) one averring that said judgment of the Negaunee Concentrating Company had been, on this 24th day of November, 1883, paid, and the other that the complainants have a plain, adequate, and complete remedy at law, and the court, therefore, had *no jurisdiction over the subject-matter of the action*, or power to make any order or decree therein, and asked that the court dismiss the cause for want of jurisdiction.

9. The first opposition made by the defendant, Brown, Bonnell & Co., after entering the said two pleas, (1 R., 11,) is in the exceptions to the special master's report of May 2, 1885. (2 R., 215, 217.)

10. Appellant, through its attorney, 23d of November, 1883, sought to *prefer* creditors by confessing, in their favor, thirty-three judgments, aggregating $570,806.69.

11. Master's report, (Exhibit A, 1 R., fol. 78,) filed June 11, 1884, shows that before December 18, 1883, date of Mr. Crawford's motion to discharge receiver, (1 R., 10,) one hundred and seventy-six intervening creditors' claims had been, by the master, reported, aggregating $1,320,226.91; all, or nearly all, were then past due.

12. Appellant then, through its said attorney, Henry Crawford, filed a motion to discharge receiver, on the

ground (1) that court had no jurisdiction of subject-matter, nor to appoint a receiver, and (2) because, on the 24th of November, 1883, the judgment of the Negaunee Concentrating Company had been paid, (1 R., 10,) which the court overruled on the 24th of December, 1883. (1 R., 10, 11.)

BRIEF FOR APPELLEE.

The foregoing recapitulation contains, we believe, the controlling facts bearing upon the merits of Brown, Bonnell & Co.'s appeal.

The question raised by this appeal may, in view of these facts, be stated as follows:

Had the court, at the time said original and supplemental bills were filed, jurisdiction, as a court of equity, to entertain said bills and appoint said receiver, on the petition of said creditors, under the facts existing at the date of filing the original bill, and had the court power to *proceed* in said equity cause after the payment of the said judgment in favor of the Negaunee Concentrating Company?

Stated in another way, the essence of the question raised by this appeal is this:

A corporation of Ohio is deeply insolvent, and has a vast number of creditors, too numerous to be made parties, and the business of which corporation is of that peculiar character described in the original and supplemental bills, and in the case of Florence Mining Company *v.* Brown, (124 U. S., 385,) and the assets consisted of property scattered throughout several of the States, consisting of real and personal property of vast amount, and of many heavy contracts in process of execution, and of stocks of material on hand, and the like, and the value of which property is in imminent danger of being,

in a very large measure, destroyed by seizures in the interest of preferred and of attaching creditors. In such a case can *some* of these creditors, some of whose claims were not due or secured by liens, but were soon to mature, proceed, by bill in equity, joining with a judgment creditor, in behalf of themselves and other creditors, to have a receiver appointed to protect and preserve said property as an entirety, and to adjust and settle the affairs of the corporation and of its creditors in the interest of themselves *and all of the creditors alike?*

Such we conceive to be, as between the appellant, Brown, Bonnell & Co., and the appellees, the issue raised by this appeal, and we, therefore, now proceed to its examination.

Effect of State Laws on Federal Equity.

The first proposition of law which we desire to state we submit in the following words:

Although it is true that equitable remedies in the United States courts are not according to the practice of the States, but according to the principles of common law and equity as defined in England at the time of the adoption of the Constitution, (3 Wheat., 221; 21 Howard, 485; 5 Peters, 280; 4 Wheat., 115; 13 Howard, 271; *a* Black., 500,) yet the proposition is equally true and thoroughly settled, which is stated in Pomeroy's Equity Jurisprudence (Vol. I, sec. 297, p. 330) in the following words:

"While, therefore, it is correctly held that the equitable *jurisdiction* of the national courts, their power to entertain and decide equitable suits, and to grant the remedies properly belonging to a court of equity, is wholly derived from the Constitution and laws of the United States, and is utterly unabridged by any State legislation, yet, on the other hand, the *primary* rights, interests, and estates

which are dealt with in such suits, and are protected by such remedies, are within the scope of State authority, and may be altered, enlarged, or restricted by State laws."

In the note 1 to this proposition the author states:

"As a familiar illustration of this proposition, I mention the statutes in many States *modifying and reconstructing the whole subject of trusts in real and personal property, and creating the separate property of married women, and the like.* While such State statutes do not abridge the jurisdiction of the national courts to entertain equitable suits concerning *trusts* or married women's property, they of course determine the *rights* growing out of these trusts of the married women holding separate property."

This extract from Pomeroy is selected because it is precisely in point as applied to the present case, since, as we insist, the rights of creditors as beneficiaries in the *trust* assets of insolvent corporations, created and existing under the laws of Ohio, are recognized and controlled as to administration, &c., by the laws of Ohio.

If, therefore, by the laws of Ohio, the assets of an insolvent Ohio corporation, instantly upon the occurrence of the insolvency, and upon the corporation ceasing to prosecute the business for which it was incorporated, become, technically and strictly, trust property, as to which the corporation cannot, by confession of judgment in interest of favored creditors, or by assignment, or otherwise, give priorities to such favored creditors, then courts of equity of the United States are *bound* to respect and administer these *rights* of creditors, so recognized, if not *created*, by Ohio statutes.

This jurisdiction of the courts of the United States in its administration of equitable remedies is held by this court to be not confined to the very rights and remedies existing at the time the Constitution was adopted, but to equally embrace all new *rights* created by State statutes,

and, also, to embrace new forms of remedy created by such State statutes.

This doctrine, in its various forms, phases, and modifications, is held in the cases following:

Railway Company *v.* Whiton, 13 Wallace, 287.
Dennick *v.* R. R. Co., 103 U. S., 11.
Ellis *v.* Davis, 109 U. S., 497.
Ex-parte Boyd, 105 U. S., 647.
Roderick's Will, 21 Wall., 520.
Ex-parte McNeil, 13 Wall., 243.
Holland *v.* Challen, 110 U. S., 24.
Reynolds *v.* Crawfordsville Bank, 112 U. S., 410.
United States *v.* Wilson, 118 U. S., 89.

In the case of Bernheim and others *v.* Bernheim *et al.*, decided in the Circuit Court of the United States for the Southern District of Georgia, in 1887, by Speare, J., (30 Federal Reporter, 885,) the precise question here involved came up, and the court held that—

"Where a statute of a State provides that, in a case of fraudulent assignments, a court of competent jurisdiction is authorized to declare the assignment void, although the assignee is not shown to have had notice of the fraud, *the equity courts of the United States have jurisdiction to enforce rights under such statute.*"

The court in this case cite and follow the case of Jaffrey *v.* Brown, 29 Federal Reporter, 476, where the court held that—

"*When under the statute of Georgia it is right to appoint a receiver, the equity courts of the United States may administer and enforce that right where they have jurisdiction.*"

So in the case of Buford *et als. v.* Holly *et als.*, 28 Federal Rep., 680, decided in the Circuit Court for the middle district of Alabama, at the May Term, 1886, by Bruce, J., the court held that—

"When a *right is conferred by a State statute* which is not

in conflict with the Constitution or laws of the United States, the courts of the United States sitting in such States can and MUST *enforce such right, in the cases in which such courts have jurisdiction.*

"New rights and remedies may have the effect to add to and increase the business of the court, but that in no proper sense increases the jurisdiction of the court."

That was a case where the court was called upon to construe a certain section (3806) of the Code of Alabama, which "*gives a simple contract creditor the right to go into a court of equity without first obtaining a judgment at law, and return of no property, to reach the property which has been fraudulently transferred.*"

As to this section the Circuit Court held that, whether this section, in the strict sense of the statute, constitutes *a rule of decision, or a rule of property, it is, nevertheless, a law which the State of Alabama is competent to pass, and is operative in the Circuit Court of the United States sitting within the State.*

The opinion of Justice Bruce, in this case, contains a very full review of the decisions of this court upon this matter; citing the cases above cited, and many others, from this court. It is able and instructive, and reaches the conclusion which we have above quoted from paragraphs two and three of the head-notes. It is a case directly in point, and results in holding that, as applied to the present case, the Circuit Court of the United States *must* apply to the administration of this corporate property the laws of *trust and rights of creditors established by the statutes of Ohio, at least as to all the assets of the corporation consisting of personal property and all Ohio real estate.*

So in Aspen Mining and Smelting Co. *v.* Bucker, (28 Fed. Rep., 220,) decided in August, 1886, in the Circuit Court for the district of Colorado, (opinion by Brewer, J.,) the court again collects and reviews the authorities, from this

and other courts, upon this subject, and holds what the head-note expresses in these words:

"Courts of equity have, concurrently with the courts of law, general original jurisdiction in matters of partition.

"*Federal courts sitting as courts of equity may administer any right of an equitable nature given by the statutes of the State.*"

II.

Bearing of Ohio Laws on this Case.

It is by these rulings of this and other courts, thus settled as the fundamental and unquestioned law of the States, and of the United States, and of this court, that, as between the States of this Union on the one hand, and the United States and their courts on the other, that wherever the legislation of a State (acting on a subject-matter reserved, by the Constitution, to the States and to the people thereof) has established any matter as a rule of decision, or of property, or of title, or of right, or has ordained, for the people of such State, equitable remedies for the securement of such rights there, and in every such case and condition, the people, who, by reason of citizenship in different States, or for any other reason, are entitled to sue in the courts of the United States for the securement of these rights, so established by the laws of the States, are entitled to *have and demand*, in such Federal courts, every such right so established by the State laws.

This being so established, by the cases which we have cited, as the law of this and of all other Federal courts, it results that if we can ascertain what, by the laws of Ohio, is the nature and extent of the property rights of the creditors of Brown, Bonnell & Co., an insolvent corporation, after such corporation had, owing to its insolvency, ceased to carry out the objects of its incorporation,

then we will thereby ascertain what property rights this court is bound to accord and administer to such creditors. And if these rights are of a nature best administerable in equity, then the equity powers of this court will be adapted and made adequate to the full securement of every such property interest so created by the laws of Ohio.

III.

State of Ohio Statutes and Decisions.

We, therefore, turn now to the inquiry, What, by Ohio laws, are the rights and remedies to which the appellees and other creditors of the appellant are entitled in the assets of this insolvent corporation?

The answer to this question is, by the state of the Ohio statutes and adjudications, rendered easy and conclusive.

In pointing now to the Ohio laws, it is proper to guard our position from being misapprehended. We do not say, or admit, that, in the respects now being considered, the Ohio laws are in any material respect different from those of most of the States of this Union, or from those of the common or the chancery law of England, or of this court; nor do we assert, or admit, that the exigencies of our case require us to rely on the state of the Ohio laws, as distinguished from the general laws of the land. On the contrary, the citations we now make from Ohio law will not only conclusively show that, by Ohio laws, the appellees are entitled to every right and remedy decreed to them by the decree here appealed from, but will, at the same time, show that these Ohio rules of title and of remedy are (with possibly some unimportant exceptions, such as that found in Catlin *v.* Eagle Bank of New Haven, 6 Conn., 233) in harmony with the law applicable, in equity, to insolvent corporations which

have ceased to prosecute the purposes of their incorporation, as such law is administered in this court and most of the State courts of this Union.

We turn, therefore, to two of the latest of the decisions of the Supreme Court of Ohio, regarding the legal relations of the creditors of an insolvent Ohio corporation to the assets thereof.

In the case of Barbour *v.* National Exchange Bank, 45 Ohio, 133, the court held what is expressed in the syllabus in these words:

"1. S. was surety of an insolvent manufacturing corporation for the payment of a large amount of overdue indebtedness. The corporation was making no effort to pay its debts. Its business could not be continued without loss and wasting of its assets. The sale of its property and collection of its accounts were necessary to the payment of its debts. S. brought his action under section 5845 of the Revised Statutes (of Ohio) to compel it to pay the indebtedness upon which he was surety, by subjecting its property to such payment. *Held:* The *appointment of a receiver of the property of the corporation was authorized by section 5587 of the Revised Statutes* (of Ohio)."

We shall again more fully allude to this case.

In the case of Rouse, Trustee, *v.* Merchants' National Bank of Cincinnati, decided June Term, 1889, found in Vol. 22, Ohio Law Journal, of date October 7, 1889, page 220, and which will appear in 46 Ohio State Reports, not yet out, the head-note reads as follows:

"A corporation for profit, organized under the laws of this State, after it has become insolvent, and ceased to prosecute the objects for which it was created, *cannot, by giving some of its creditors mortgages on the corporate property to secure antecedent debts, without other consideration, create valid preference in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors.*"

The opinion is by Williams, J.

After criticizing the case of Catlin *v.* Eagle Bank of New Haven, 6 Conn., 233, this being one which held that an insolvent corporation could prefer creditors the same as an individual could, as holding a doctrine founded on the mistaken idea that insolvent corporations had the same absolute dominion over their property after insolvency as have individuals, proceeds, at length, to consider the case.

The following are some extracts from the opinion:

"It is now *firmly established* that the property and assets of a corporation are a *trust* fund for the payment of its debts, especially in case of insolvency. Since the case of Wood *v.* Dunmer, (3 Mason, 311,) where Mr. Justice Story is said to have first formulated the doctrine, it has been generally accepted, and is sustained by the highest authority. Mr. Justice Swayne announces it with great clearness in Sanger *v.* Upton (91 U. S., 56–60) as follows: 'The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. *The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation, for their security.*'"

The opinion proceeds:

"In Curren *v.* State of Arkansas, (15 Howard, 312,) Mr. Justice Curtis said on this subject: 'The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of its creditors and stockholders, and the court of equity will lay hold of the fund, and see that it be duly collected and applied.'

"In Nepton, Assignee, *v.* Tribilcock, (91 U. S., 45–47,)

Mr. Justice Hunt thus lays down the doctrine: 'The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution.' "

The opinion then quotes from 2 Morawetz on Private Corporations, section 803, where the author is contesting the doctrine that an insolvent corporation may, the same as an individual, prefer creditors:

"This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an *equal* distribution of the common security, has often been recognized by the courts of equity in adjusting the rights of creditors among themselves and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors *become fixed*. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved, by implication, to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner by giving it or its agents the power, after the company has become insolvent and has ceased to carry on business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress.

"The doctrine that an insolvent corporation may prefer certain creditors at the expense of others seems to have been first started in Catlin *v.* Eagle Bank, a case in which

the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice."

The opinion then quotes from Waite on Insolvent Corporations, sections 162 and 654, to the same general effect.

The conclusion of this part of the opinion is in these words:

" Without extending the discussion, we are of opinion that when a corporation for profit, organized under the laws of this State, becomes insolvent, and ceases to carry on its business, or further pursue the purposes of its creation, the corporate property constitutes a *trust fund for the equal benefit of the corporate creditors in proportion to the amounts of their respective claims; and it cannot, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create a valid preference in their behalf over other creditors, or over an assignment thereafter made for the benefit of creditors.*"

It must be carefully kept in mind that, in this case of Rouse, trustee, no judgment creditor complained of the preference attempted to be given by the chattel mortgage, but a trustee defended against that mortgage in the interest of all creditors. If there had been no trustee for creditors, then any creditor, without a judgment or any specific lien, might, according to the clear holding of the court in this case, have brought the suit to have the preference declared void. (See Combs *v.* Watson, 322 Ohio St., 228, and Hellebrook *v.* Richter, 37 Ohio St., 222.)

Another section of the statutes of Ohio which has special application to the present case, because of the fraudulent attempt to give preference to said thirty-three

judgment creditors, in whose favor judgments were confessed, (1 R., 19,) is section 6344, which provides, amongst other things, as follows:

"All transfers, conveyances, or assignments made by a debtor, or procured by him to be made, with the intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor."

It was under this section that the chattel mortgage, which was complained of in the case of Rouse, trustee, *supra*, was declared void, as is disclosed by the above quotations, to wit, because the creditors of such insolvent corporation *have an equitable lien on all the assets of the concern for their equal benefit*, and, hence, said attempted preference by chattel mortgage was held void, not only on general principles, but because it contravened the provisions of said section 6344, as tending to "hinder" creditors.

Again: The statutes of Ohio secure to general creditors, although having no judgment or specific lien, another important right, as against insolvent debtors, which has material bearing on the present case. This provision of said statutes is considered and adjudicated in Barbour *v.* National Exchange Bank, 45 Ohio Stat., 133, already alluded to.

In that case there was no judgment or other specific lien held against the insolvent corporation, and the suit was brought under section 5845 of the Revised Statutes of Ohio, which authorized a surety to maintain an action against his principal, to compel him to pay the debt for which the surety is held before the debt becomes due. A receiver was applied for, and the court held that the appointment of the receiver was authorized by section 5587 of the Revised Statutes of Ohio, which provides for the appointment of a receiver in certain designated cases, amongst which cases are—

"1. By a *creditor to subject any property or fund to his claim.*" * * *

"6. In all other cases where receivers have heretofore been appointed *by the usages of courts of equity.*"

The opposing brief prominently relies on the general doctrine that receivers are never appointed at the suit of creditors who have neither judgments nor specific liens on the property sought to be placed in the hands of the receiver.

We have seen, and shall further see, by the cases from this and other courts, that this proposition is utterly untenable as a general doctrine of equity. But were it such, yet it is settled by the Supreme Court of Ohio, construing said section 5587 of the Ohio statutes, that this is not the law of that State; and we have seen that rights of creditors secured by the statutes of a State are "*rights*" enforceable in the Federal Courts.

The Supreme Court of Ohio, in the case of Barbour, *supra*, (45 Ohio State, 140,) after quoting said section 5587, Rev. Stats., proceeds in these words:

"The jurisdiction of the court of chancery to appoint a receiver has been assumed for the advancement of justice, and is founded on the inadequacy of remedies to be obtained in courts of ordinary jurisdiction. (Kerr on Receivers, 1.) It was said by Lord Chancellor in Bainbridge *v.* Baddeley, 3 Mack. & Gor., 419: '*There are few cases that can be stated in which the court has not jurisdiction when it is essential to the justice of the case to interfere to preserve the property for the party entitled to the appointment of the receiver.*'"

The court then proceeds, at length, to show that, under said paragraph 6 of section 5587, receivers have "heretofore been appointed by the usages of courts of equity" in all cases where there was insolvency, and an attaching of equitable liens in favor of creditors to the insolvent's property, or where there was imminent peril of the loss

of the property, and the destruction of the rights of creditors.

Hence, even if this appointment of the receiver, in the case at bar, were not defensible upon the principles of equity as applied throughout the States, yet because that the Supreme Court of Ohio has given to the statutes of that State a construction which justifies the appointment made in the present case, and as these Ohio Statutes at least recognize, if they do not *create, these "rights"* in favor of creditors, as against real and personal property in that State, and as these "rights" become in that State, in virtue of said statutes, laws, or "rules of title," this court must adopt the construction which the Ohio court puts upon its own statutes, and accord to the Ohio creditors the rights created by such statute. (See the cases cited herein.)

IV.

Supreme and Circuit Court Decisions.

But we now turn to an inspection of a few of the most recent decisions of this court relating to the same important matters covered by the decision of the Supreme Court of Ohio in the case of George L. Rouse, Trustee, *v.* The Merchants' National Exchange Bank of Cincinnati (46 Ohio State,).

The case of Mellen *v.* Moline Malleable Iron Works (131 U. S., 352) is the latest reported case, from this court, which has come under our notice, and is one which, if followed in the present case, will, we think, rule it, at least in some of the most important principles involved in this appeal.

It will be observed that the case made by the bill in equity filed in the United States Circuit Court for the Northern District of Illinois by the National Furnace Company, a corporation of Wisconsin, brought against

an insolvent corporation of the State of Illinois, to wit, the said Moline Malleable Iron Works, (131 U. S., 355, 356,) was, in all essential respects, identical with the original and supplemental bills in the present case.

It should be further carefully observed that the bill by Mellen *et al.*, filed May 5, 1884, (131 U. S., 354, 355,) was one which attacked the decree of the Circuit Court of the United States, rendered in said case of the National Furnace Company, (131 U. S., 355, 356,) upon all of the grounds on which appellant in the present case attacks the decree here appealed from.

This attack, by said bill filed by Mellen, upon the said decree in favor of said Furnace company, is thus described by this court (131 U. S., 356):

"The object of that suit, as the bill in the present case averred, was to obtain a decree dissolving the Moline Malleable Iron Works as a corporation, *closing up its business, ascertaining the amount, as well of its assets applicable to the payment of debts as the extent to which its directors and officers were liable to creditors, and adjudging that the said conveyances executed by that corporation were fraudulent and void as to the National Furnace Company and other creditors.*

"It was further alleged that the *debt of the last-named corporation was not, nor was any part of it, due when it brought said suit, and was not secured by any attachment or other process against the property of the debtor corporation; that it had not exhausted its legal remedies for the collection of its debt, and had no lien or claim to the property covered by said trust deed or mortgage; and, consequently, that the court could not and did not acquire jurisdiction to make any valid decree affecting the interest of said Hill.*"

It is seen by this extract, just given, that the said decree in favor of the Furnace company, and which was pleaded as an estoppel to the said Mellen suit, was one rendered in favor of creditors whose claims were not due when their bill was filed against the insolvent Illinois corporation.

It will be further observed that the said suit by the Furnace company was in favor of creditors who had neither an attachment nor a judgment, nor a levy of any kind, nor any other form of lien; and that such creditors filing said bill were, on the other hand, simply "creditors at large," holding unmatured claims against the insolvent Illinois corporation, and that their claims were of a kind suable in an ordinary action of assumpsit; and, hence, belonged to that class which appellants, in this case, allege are not subject-matters of which courts of chancery have jurisdiction.

It will, also, be observed that all these objections were strenuously urged to overthrow the said decree of the Circuit Court of the United States in favor of the National Furnace Company and other creditors.

Such was, in every respect here material, the exact character of the orders and decrees which were pleaded as *res judicata* in this case of Mellen *v.* Moline Iron Works.

Now, what this court in that case decided, and which has bearing on the case at bar, was *not* that there was no *error* in the steps by which the Circuit Court for the Northern District of Illinois reached its order, of August 1, 1883, (131 U. S., 357, 358,) appointing a receiver of the assets of said insolvent corporation, and directing the taking of possession of all the assets and business of the corporation; or in reaching that other order of December 22, 1883, (131 U. S., 360,) directing that the receiver should sell all of the said corporate assets; or in reaching the final decree in the case which was so pleaded as an estoppel; (bottom page 367, 131 U. S;) but what this court *did*, in that case, decide, and which has vital application to said pleas of appellant, (1 R., 9,) denying the jurisdiction of the court in the case at bar, of the subject-matter of the suit, and denying the jurisdiction of the court to appoint a receiver, or to proceed further with the case, was that the Circuit Court had jurisdiction of

the subject-matter for all the purposes for which said suit of the Furnace company was prosecuted, and jurisdiction to make all the orders therein for appointment of receiver, taking charge of the business of the corporation, selling the property, &c., and this although the creditors so suing in equity were suing on unmatured claims, where there was neither attachment, judgment, levy, or lien of any kind.

This decision by this court, so holding in favor of the jurisdiction of the Circuit Court in a case of that description, is absolutely conclusive against the only pleas set up by Brown, Bonnell & Co. in the present case. (1 R., 9.)

The language of the opinion on this point of jurisdiction is as follows (131 U. S., 366):

"The Furnace company, in behalf of itself and other creditors of the iron works, claimed an interest in such property as constituting a *trust* fund for the payment of the debts of the latter, and the right to have it subjected to the payment of their demands. *In Graham* v. *Railroad Company, 102 U. S., 148, 161, this court said that 'when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.'* (See, also, Mumma *v.* Potomac Company, 8 Pet., 281, 286; County of Morgan *v.* Allen, 103 U. S., 498, 509; Wabash, &c., Railway *v.* Ham, 114 U. S., 587, 594; 2 Story's Eq. Jur., sec. 1252; 1 Perry on Trusts, sec. 242)."

This case, therefore, as already remarked, rules the present case against the appellant as to every question of power and jurisdiction raised by its only pleading in the case (as found in 1 R., 9). You held that there was jurisdiction in the Circuit Court of Northern District of Illinois to render the orders and decree which were rendered in favor of said Furnace company, and that

you were not required to, and could not, pass upon the question whether any error intervened in reaching that decree, because such question of error could not be raised collaterally against the decree pleaded in bar.

This, therefore, leaves nothing for contestation in the present case on behalf of appellant, except, possibly, the question whether there was such error in appointing a receiver and going on with the case, instead of dismissing it, as will induce this court to reverse the decree below, and to thus reverse, *although* the appellee never, by answer or otherwise, resisted the appointment of the receiver or denied any averment of the bill or cross-bill, but, on the contrary, in effect *acquiesced in and consented* to the appointment of a receiver by (1) voluntarily entering his appearance to the bill asking the receivership and accepting notice; (2) never filing any answer to bill or cross-bill; (3) by allowing decrees *pro confesso* to be taken on the said bills; and (4) by making no manner of resistance in the case until after the great body of the debts of the corporation had been presented to the court by intervening petitions, and had matured; and (5) by confessing a judgment in favor of the Negaunee Company—this in aid of the suit for receiver, &c.

As bearing on this question whether there was error in the appointment of the receiver, the question of fact as to whether the defendant either assented to or acquiesced in that appointment has most material weight. Now, please further note what goes to show that appellant did so acquiesce.

In this case Brown, Bonnell & Co. acquiesced in, and consented to, the appointment of a receiver. It, on the 17th of February, 1883, became suddenly and hopelessly insolvent. On the 20th of February it, by attorney, confessed a judgment in favor of the Negaunee Concentrating Company, which company and other complainants already had a bill for a receiver drawn; for, on this *very*

same day, the bill was filed and an application made for the appointment, and the corporation caused its appearance to be filed at once, waived service of notice, (1 R., 5,) made no opposition to such receivership, and, *on the same day*, the appointment was made.

The appearance and waiver is one of the papers Mr. Crawford omitted from his meager Record. It is in 2d Record, p. 7, and reads:

"The appearance of the defendant is hereby entered in the above cause, and service of notice of the motion for appointment of receiver accepted."

The entry of appointment does not read by consent, but a company confessing a judgment and entering an appearance and waiving notice at once, for the sake of having an appointment made at once, fairly *acquiesces* in the appointment.

In Wallace *v.* Loomis, 97 U. S., 163, Mr. Justice Bradley says of the appointment:

"It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve trust funds in its hands. It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or *acquiescence* of the parties interested in the funds. In the present case it appears that the parties most materially interested either expressly consented to the order, or *offered no objection to it.* The appellant complains that it was made *without due notice* to the second mortgage bondholders; but this cannot properly be alleged, inasmuch as the trustees of the second mortgage *were parties to the suit, and had due notice of its application, and made no objection to its being granted.*"

See, also, Waterworks Company *v.* Barrett, 103 U. S., 517.

Waivers (not going to jurisdiction of subject-matter) made below, can never be withdrawn to the prejudice of the party in whose favor made; and can never be with-

drawn in this court; and this court expressly applies this rule to assent to appointment of a receiver.

Water Co. *v.* Barritt, 103 U. S., 516.

But, aside from this acquiescence, it is, we submit, impossible to hold, in view of what we have quoted from the opinion of Mellen *v.* Moline Iron Works, *supra*, that there was any *error* whatever in the courts proceeding in the case to finally administer the affairs of the said insolvent corporation in the equal interest of all creditors.

When this court held, as it did, in the language we have cited from the opinion of Justice Harlan, (131 U. S., 366,) that "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a *trust* fund for the benefit of its stockholders and creditors," it held not only in favor of the *jurisdiction* which the Circuit Court exercised in the case at bar, but it asserted a principle conclusive of every possible question in this case, not merely of jurisdiction, but as to the absence of all error.

This holding in Mellen's case, *supra*, was foreshadowed by the language of this court in Terry *v.* Anderson, 95 U. S., 636:

"Ordinarily a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed at equity to subject choses in action to its payment. To this rule, however, there are some *exceptions*, and we are not prepared to say that *a creditor of a dissolved corporation may not under certain circumstances claim to be exempted from its operation.* If he can, however, it is upon the ground that the *assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee—the principle being that equity will not permit a trust to fail for want of a trustee.*"

Case *v.* Beauregard, 101 U. S., 688, 690, 691, is one which covers every alleged error brought into view by this appeal.

The court there, when considering when resort may be had to a court of equity without exhausting the remedies at law, on page 690 states as follows:

"But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the *only* possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly, the rule, though general, is not without any exceptions. Neither law nor equity requires a meaningless form—'*bona sed impossibilia non coget lex.*' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. (Turner *v.* Adams, 46 Mo., 95; Postlewait & Creagan and Keeler *v.* Howes, 3 Iowa, 365; Toconie Bank *v.* Harvey, 16 *Id.*, 141; Botsford *v.* Beers, 11 Conn., 369; Payne *v.* Sheldon, 63 Barb., N. Y., 169.) This is certainly true where the creditor has a lien or a trust in his favor.

"So it has been held that a creditor, *without having first obtained a judgment* at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, *and to subject the property to the payment of the debt due him.* (Thurmond and Others *v.* Reese, 3 Ga., 449; Cornell *v.* Radway, 22 Wis., 260; Sanderson *v.* Stockdale, 11 Md., 563.)

"In Brisay *v.* Hogan (53 Me., 554) it was ruled that when a creditor seeks, by his bill, to obtain payment of his debt from land paid for by the debtor, but conveyed to his wife, a *levy of an execution* is unnecessary, if the debtor never had legal title to the land. (See, also, Day *et al. v.* Washburne, 24 Howard, 352.)

"The foundation upon which these and many other similar cases rest is that *judgments and fruitless executions are not necessary* to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.

"But, without pursuing this subject further, it may be said that *whenever a creditor has a trust in his favor*, or a lien upon property for the legal debt due him, *he may go into equity without exhausting legal processes or remedies.* (Tappan *v.* Evans, 11 N. H. 311; Holt *v.* Bancroft, 30 Ala., 193.) Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that *a general creditor has no lien.* And when such bills have been sustained, without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien, *or a trust*, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

By this holding, therefore, it is distinctly settled that when the bill asserts a lien *or a trust*, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference; and this is, we submit, conclusive against the merits of the present appeal.

Or take the case of Trust Co. v. Midland R'y Co., 117 U. S., 434.

The case is one strongly enforcing the doctrine which is stated in the opinion in the following words, speaking of the jurisdiction and powers of courts of equity protective of trust interests and the rights of creditors therein:

"It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." (Page 455.)

Again, on page 456, speaking of insolvent corporations, the court says:

"All persons who deal with the corporation, as creditors or holders of its obligations, must necessarily be held to do so in the view that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice."

On pages 455 and 456 the court emphasizes the rule of equity which will look to the peculiar condition and nature of the property and business involved in determining upon the propriety of a receivership, and will, wherever from that peculiar nature such receivership is necessary to the preservation of the property and its judicious administration, appoint a receiver.

Of this case of Union Trust Co. *v.* Illinois Midland Co. (*supra*) this court, in the case of Sage *v.* Railroad, 125 U. S., 361, speaks, and describes its character, in the respect here involved, as follows:

"The co-plaintiffs with Hervey were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver, in the interest of all the creditors of all four of the corporations, to *prevent the levy of executions on such property*; and *it prayed for a judicial ascertainment and marshaling of all the debts of all the corporations and their payment and adjustment as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits.*"

After thus alluding to the character of the case in 117 U. S., the court proceeds, in regard to the case then at bar, in these words:

"In the present case, it is true, Sage did not sue out execution upon his judgment and have a return of *nulla bona*. But that point has become immaterial. *The railroad company made no such objection at the time the receiver was appointed.* Besides, suing out an execution would, according to the facts and the admissions of the parties, have been *an idle ceremony*, causing useless expense, and bringing no real benefit to the plaintiff. It is true, also, that Sage did not sue in behalf of all the creditors of the company, or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege, under the law, to sue for his own benefit, as it was within the power of the court, for his protection as a judgment creditor, to place the property of the debtor company in the hands of a receiver, for administration under its orders."

Further cases to the same effect are collected in the opinion, Deady, J., in the Holliday case, 27 Fed. R., 845. The same thing is strongly stated by Brewer, J., in Clapp *v.* Dittman, 21 Fed. R., 18. The same thing is in the opinion by Blatchford, J., in Johnson *v.* Powers, 13 Fed. R., 316.

This court further proceeds to say, that the appointment of a receiver is a matter resting within the sound judicial discretion of the court, to be exercised cautiously, and concludes in these words (125 U. S. R., 371):

"All that we say in this connection is, that under the circumstances presented in this case, the appointment of the receiver was within the power of the court. The order appointing him and directing him to operate and manage the property was not a nullity."

We might multiply, indefinitely, the cases asserting the doctrine, which is stated by this court in the case of Mellen *v.* Moline Iron Works, in the paragraph from the

opinion by Justice Harlan which we have quoted, (page 366 of 131 U. S.,) and, also, stated in the cases by the court there cited.

We especially call attention to the cases cited in this opinion by Harlan, J., of—

Morgan County *v.* Allen, 103 U. S., 508, 509.
Wabash Co. *v.* Ham, 114 U. S., 594, 596, 597, and 598.

The language of the opinion by Justice Harlan, on page 508, is especially applicable to the case at bar. He says, quoting from Sawyer *v.* Upton, 91 U. S., 56:

"The capital stock of an incorporated company *is a trust* fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied otherwise than to their demands until such demands are satified. *The creditors have a lien upon it in equity.* If defrauded, they may follow it as far as it can be traced, and subject it to the payment of their claims, except against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly a pledge to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

The same doctrines are held in—

Upton *v.* Tribilcock, 91 U. S., 45.
Webster *v.* Upton, 91 U. S., 65.
Hatch *v.* Dana, 101, U. S., 205.

These cases, then, conclusively settle the law of this court to be that after insolvency, and after it ceases to pursue the ends of its incorporation, the assets of an insolvent corporation are a *trust for creditors;* that such creditors *have a lien upon the property; that they may follow it wherever it can be traced and found;* and that such creditors can, by suit in equity, take possession of the property and administer it for the benefit of creditors generally, and that, in such suit, it is competent for the courts to ascertain and adjudge the amount due to every creditor without sending their claims to be adjudicated at law, and may, through a receivership, manage and settle up the entire concern.

V.

Claims not Due at Commencement of Suit.

It is understood that much reliance was placed by the appellant in prosecuting this appeal upon the fact that most of the claims owed to complainants in the original and supplemental bill were not due at the time the original bill was filed.

This position of appellant is very well answered in the extract we here subjoin from the opinion of Shipman, J., in the case of Brassey *v.* R. R. Co., 19 Federal Reporter, 663–669, decided in the United States Circuit Court for the District of Connecticut, in March, 1884. The headnote reads as follows:

"An insolvent railroad corporation may, in the discretion of the court, upon a bill for an injunction and receivership, be put in the hands of a receiver whenever the welfare of the various interests clearly require it, even though no default has actually been made by the corporation in its obligations to the petitioner, but a default is imminent and manifest, and the corporation is in peril of breaking up and destruction of its business."

It will be seen, by an inspection of the opinion, that the facts in that case were, in material respects, quite like those stated in the original and supplemental bill in this case. The defendant was a corporation, and was hopelessly insolvent; had a large number of creditors; had that peculiar kind of property and business which pertains to railroads; and being so unable to meet their debts, and in imminent peril of being wound up by attachments and other legal proceedings against them, a vote of the directors assented to the appointment of a receiver; and a petition was presented by certain creditors to dissolve the order appointing a receiver, &c., they placing their petition on the ground that neither the allegations of the original bill, nor the facts in regard to the railroad, existing at the date of said appointment, justified that appointment; but, on the contrary, the appointment was part of a "plan" on the part of sundry directors to injure the corporation for selfish purposes.

Such was the general character of that case.

On page 669 the court says:

"Were the allegations of the bill sufficient to justify the appointment of a receiver? The petitioners' position is that, ordinarily, to justify such an appointment, a case must be pending in which other and principal relief is sought—as to foreclose a mortgage. It is true that, in general, a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by receivership, such relief must be refused, because the *time has not arrived* when other substantial relief can be asked. For example, although, as a rule, a mortgagee cannot ask for relief until his mortgage debt *has become due*, he can go into a court of equity before that time has arrived, and ask for an injunction and a receiver to prevent the subject-matter of his mortgage from being impaired and wasted. As was said in Long Dock Co. *v.* Mallery, 12 N. J. Eq., 431—

'The power of the court to preserve the pledge from destruction, and to answer to the exigencies of the mort-

gage, is undoubted. * * * If the bill shows a case for an injunction and receiver, the exercise of the power is called for, *although the time of payment set in the mortgage has not come,* unless the equity of the bill is met by the answer.'

"This bill alleged the existence of the corporation and the first and second mortgage bonds, and of the actual inability of the road to pay its interest, to become due on January 1st; the existence of the floating debt, and its inability to pay that; the *intention of some of the creditors to attach* the mortgaged property; the peril of the road arising from *anticipated attachments* of the property covered by the second mortgage; and the loss of and breaking up of the business of the road from its inability to pay connecting lines, and its consequent inability to pay the interest due on February 1st. In brief, it alleged the insolvency of the road, although not in terms, and the danger and hazard of serious injury to the revenues of the company unless suits were prohibited, and those who did business with it were assured that its current expenses were to be paid. Those allegations were *admitted* both by the corporation and by the trustees of the second mortgage. I am of opinion that when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of breaking up and destruction of its business, and confesses this inability, although no default has as yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where upon a bill for an injunction against attacks upon the mortgaged property, and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed."

This case, and others like it, are quite sufficient, as seems to us, to answer any point that may be made in reliance upon the fact that the claims of the complainants in the original and supplemental bill were not all due at the date of filing said original bill.

VI.

Equity's Right to Make Complete Settlement.

That where a court of equity obtains jurisdiction of a subject-matter, as, for example, of the affairs of an insolvent corporation, like the one in suit, in virtue of the equitable jurisdiction which such courts exercise over all matters of trust and the like, there the court will not send the questions arising therein to a jury for trial, but will retain them for the purpose of complete settlement, this for the avoidance of multiplicity of suits, &c., is thoroughly familiar and settled law.

In Ober *v.* Gallagher, 93 U. S., 206, on this point the court says:

"The court had, therefore, jurisdiction of the suit as originally brought, and this jurisdiction was not defeated by the amendment which introduced the *notes*, not in judgment, but secured by the lien, into the case. Having obtained rightful jurisdiction of the parties and the subject-matter of the action for *one purpose, the court will make this jurisdiction for complete relief.* (Story's Eq., 64 k.)"

The same thing is decided in Taylor *v.* Ins. Co., 9 How., 405.

The same thing is repeated in Ward *v.* Todd, 103 U. S., 329.

And the same doctrine as to the right of courts of equity, when by reason of the existence of a trust, or otherwise, they have obtained jurisdiction of a subject-matter, to retain that jurisdiction and try all issues necessary to finally dispose of and settle the subject-matter, and, without an invasion of any constitutional right, to dispense with what ordinarily would be a trial by jury, is again repeated in Barton *v.* Barbour, 104 U. S., 133, 134, and the cases are there cited, including the citation of Rub-

ber Co. *v.* Goodyear, 9 Wall., 738; Carwood Patent, 94 U. S., 695; Marsh *v.* Seymour, 97 U. S. 348.

And see the cases fully cited, note 2, section 181, vol. 1, Pomeroy's Eq.

And this is the settled and unquestionable law of this feature of the case.

VII.

Florence Mining Company Case.

It seems to us, and we therefore submit, that if the cases which we have now gone over leave any doubt as to the soundness of the decision, of the court, here appealed from, that doubt must be regarded as settled by the judgment of this court pronounced *in this very case*, as found in the case of Florence Mining Co. *v.* Brown, 124 U. S., 385.

The Florence Mining Company was a party, by intervening petition, in the case at bar, (2 R., 15,) and by such intervening petition claimed that there was due to the company, from Brown, Bonnell & Co., $111,322.41, as principal and interest thereon, (2 R. 17,) but recovered a judgment in the court below for only $61,715, (2 R., 40,) and, hence, appealed to this court. And in this court the judgment of the court below was affirmed. (124 U. S., 391.)

The contest in this court was in regard to the necessity of a vendor offering to deliver property sold to the vendee, Brown, Bonnell & Co., in order to recover damages for the non-performance of the contract; and no question, so far as is disclosed, was made in regard to the competency of a court of equity to adjudicate the claims of creditors in this equitable proceeding.

On the contrary, that right to so adjudicate was, throughout the case, assumed, on all hands and by the court, in so affirming said judgment. Still, although

the question was not made, the decision is, for that reason, none the less significant, as held by this court, of the power to so adjudicate.

This is so simply because this court has repeatedly held that the objection that the *remedy is at law* will be taken by the court *sua sponte*, though not raised by the pleadings or suggested by counsel.

Speaking in regard to the prohibition contained in section 723 of the Revised Statutes, which enacts that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy at law may be had," this court says:

"The objection was not taken by demurrer or in the answer. In the courts of the United States *it is regarded as jurisdictional, and may be enforced by the court sua sponte, though not raised by the pleadings nor suggested by counsel.* (2 Cranch, 415; 5 Pet., 496; 2 How., 383.)"

So in Lewis *v.* Cocks, 23 Wall, 466, 470, the court says:

"In the present case the objection (that there was remedy at law) was not made by demurrer, plea, or answer, nor was it suggested by counsel. Nevertheless, if it clearly exists, it is the duty of the court, *sua sponte*, to recognize it and give it effect."

So in Killan *v.* Ebbinghaus, 110 U. S., 574, the court says:

"This objection to the jurisdiction of the court may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel."

In Reynes *v.* Dumont, 130 U. S. R., 394 and 395, and in Kilbourn *v.* Latta, 130 U. S. R., 514, this court states the exception to this rule that the court will, *sua sponte*, enforce the provision of said section 723, Rev. Stats., to wit, that if the want of jurisdiction in equity is *not* apparent on the face of the bill, there the objection must be

raised in the lower court. Here the grounds of the *alleged* want of jurisdiction is apparent on the face of the bill, and hence it is enforced by the court's own motion.

When, therefore, this court, with this familiar rule in mind, which asserts that the prohibition contained in section 723 of the Revised Statutes "*is jurisdictional*," went forward and affirmed the judgment in the case of the Florence Mining Co. *v.* Brown, it therein and thereby asserted the jurisdiction of the court below to proceed, as it was proceeding, in that case, in equity, to adjudicate, without jury, all the claims of the creditors of Brown, Bonnell & Co., and to settle and wind up its affairs.

And this case, therefore, logically considered, furnishes the authority of this court in favor of the regularity and validity of all orders and decrees made in the court below in winding up the affairs of the insolvent corporation.

VIII.

State of Facts when Motion to Discharge Receiver was Made.

There is another view of this appeal which may be properly stated, though it is difficult for us to see how such view can be necessary in the light of the unvarying line of decisions, by this court, to which we have referred. That view is this:

Suppose it be conceded that, at the time the receiver was, in this case, appointed, and, under the facts then existing, the said appointment was an unusual, or even an unjustifiable one, according to the laws relating to that regulated discretion which is exercised in making such appointments, then, and in that case, was it error in the court to refuse to discharge the receiver and dismiss the bill, *at the time, and under the conditions existing, when the motion to discharge the receiver and to dismiss the*

bill was first presented, on the 18th of December, 1883? (*1 R., 10.*)

In other words, suppose that neither the then existing and confessed insolvency of said corporation; nor the immense number of creditors of said corporation having claims unadjusted and unknown; nor the enormous extent and variety of the assets of said corporation and their peculiar condition, including therein the good-will of the concern; nor the great amount of unexecuted contracts then in the process of execution, the failure to fully perform which would result in enormous loss; nor the fact that seizures of the property were being made, and that others were threatened, which would inevitably result in the destruction, to a large extent, of the value of the plant and assets of the concern; nor the fact that some creditors were seeking to, and would, obtain unjust priority over other creditors (Fink *v.* Patterson, 21 Fed. Rep., 602) by such seizures, and the like; nor the fact that the defendant, in legal effect, *consented* to the appointment of the receiver, by making no objections thereto, and, on the contrary, entering a voluntary appearance, with acceptance of notice, and filing no denials of the averments of the bills; nor the fact that such insolvency of said corporation, and its ceasing to do business resulted in giving to complainants an equitable lien upon all the assets of the concern, as trust property; nor all these facts and considerations put together, justified, according to equity precedents, the appointment of a receiver *when* the appointment was made,—then, and even in that case, was not the court justified by the rules of equity, in refusing to *discharge* the receiver *when* the defendant, in December, 1883, changed his mind and withdrew his said consent to such receivership, and moved the discharge thereof, and the dismissal of the bill?

The answer to this inquiry requires that we should

again turn to an inspection of the conditions in which this affair had come to be at the date of this motion, to wit, December 18, 1883.

Before this motion to discharge the receiver was made, and between the date of that motion and the filing of the original bill, the following things had transpired:

1. The supplemental bill had been filed, setting forth the additional facts therein contained.

2. The defendant had omitted to make any answer whatever to the original bill or the supplemental bill. (2 R., 21.)

3. A decree *pro confesso* had been taken upon the original bill and the supplemental bill. (2 R., 21.)

4. Certain mortgage creditors had (December 1, 1883, 1 R., 30) filed an answer and cross-bill, afterwards ordered to be treated as an intervening bill, (1 R., 11, and 1 R., 33,) in which it was charged, among other things, that some $240,000 were due to said cross-petitioners from said defendant, and that defendant was fraudulently seeking to give preference to creditors by confessing judgments in favor of such preferred creditors, to the amount of $570,806.69. (1 R., 19.)

5. Intervening creditors of said defendants had, under authority of the court, (as appears by the special report of the master, in Exhibit A, 1 R., tables inserted between pages 36 and 37,) filed petitions like that of the Greenville National Bank (2 R., 252, 253; see stipulation, 2 R., 1) demanding judgments upon claims matured, amounting in the aggregate to $1,320,226.91; all, or about all, of which were past due and unpaid.

6. The entire body of the assets, contracts, and business of the said corporation had, at the date of said motion to

discharge the receiver, been in the hands of such receiver for a period of ten months; new conditions had arisen; new contracts had been made, &c., &c.

The question we have now reached is (to repeat it), whether, in this condition of facts, a court of equity would discharge the receiver, turn over the property to the insolvent corporation, and to the preferred creditors, defeat that equality between the creditors which, in these courts, is equity, and leave the great body of the creditors without share in the assets and without remedy, even though the court would, under the facts existing when the receiver was appointed, not have made the appointment?

Now, it seems to us that this is not a distorted, but a fair, statement of the question raised by the appellant's position, which asserts that, because the conditions existing at the time of the appointment of a receiver (February 20, 1883) did not warrant such appointment, therefore the receiver ought, without regard to the state of things existing at the date of said motion to discharge the receiver, to have been discharged, and that the court ought to have dismissed the case at the time of such motion, December 18, 1888, (1 R., 10,) or at the time when appellant interposed his two pleas, on the 24th of November, 1883. (1 R., 9 and 10.)

This position is one which, as it seems to us, is so plainly wrong, that we should not here allude to it but for the fact that appellant's brief strenuously insists on the adoption of this position by the court.

That the position is unsound, we think is conclusively shown by many considerations.

In weighing these considerations it must be kept in mind that we assume what has been established by the decisions of this court quoted above, namely, that, in case of an insolvent corporation, organized under the laws of Ohio, and which, owing to such insolvency, has ceased

to accomplish any of the purposes of its incorporation, the entire body of the assets of such corporation became, instantly upon the occurrence of such insolvency, impressed with a trust for the equal benefit of all creditors, and which trust courts of equity will administer for such equal benefit of creditors, although the creditors may not, at the institution of the equitable proceedings, have obtained judgments at law.

Assuming this legal proposition, just stated, to be established, then the questions now to be considered resolve themselves into this question:

Whether, in a case like the present, where a receiver would be appointed, under the state of facts existing December 18, 1883, and where the court would take jurisdiction to administer the affairs of the insolvent concern, a court of equity will, on such December 18, 1883, *dismiss* the proceedings and *defeat* that equal distribution to creditors which the law favors, merely because that when the original bill was filed some of the claims sued on by the claimants in the original and supplemental bill were not due, nor reduced to judgment, or because the alleged insolvency was not then conclusively established, or because, as is asserted in the opposing brief, the corporation was, at the date of such appointment of said receiver, in active discharge of its accustomed business, and was in no default as to the payment of matured debts.

That this last question must be answered in the negative is, as seems to us, shown by the most familiar principles, and by some of the maxims, of courts of equity.

One of the principles of equity, regarded as amongst the maxims, is that the courts will never, at the expense of justice, do a vain thing, as, for example, discharge the receiver, and then immediately reappoint one.

The condition of things existing December 18, 1883, when the motion to discharge and dismiss was first made, was undeniably a condition in which the appointment

of a receiver and the equitable assumption of jurisdiction, in the equal interest of creditors, was a duty of the court.

That jurisdiction and that duty are unmistakably impressed upon the law of this court by the holding which we have cited from Mellen *v.* Moline Iron Works, 131 U. S., 366, asserting that—

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

If what is just stated from this court is law, then the only conceivable objections to the appointment of a receiver, February 20, 1883, were, as is alleged, that some of the claims were not due; that the corporation had made no actual default as to creditors; that the insolvency was not so manifest and confessed as to justify the court in assuming its existence, and that complainants had no *specific* lien, as distinguished from the equitable one arising out of said trust on said assets.

But, on the 18th of December, 1883, and the 24th of November, 1883, when appellant first made known his change of mind by open act in court, and withdrew his, at least tacit, consent to the receivership, all of these objections to the appointment were gone.

The insolvency was then confessed, and shown to be overwhelming. The creditors had come into court and filed their petitions in obedience to the order of court, and were numerous and scattered throughout many of the States; the said claims were due; the corporation was utterly unable longer to discharge the purposes of its incorporation, and all the other recognized grounds for appointment of receiver were existing; and if said

trust property was to be administered in the equal interest of all creditors, the appointment of a receiver was, at that time, a commanding necessity.

Will the court, in this condition of affairs, discharge a receiver, and then instantly appoint one, as it must, in obedience to the settled requirements of equity?

Again, at the time when appellant first made known to the court its said change of mind, and showed a determination to discharge receiver and dismiss the bill, and to thus, and thereby, attempt to give unjust priority to the thirty-three judgment creditors in whose favor the corporation had confessed judgments amounting to $570,806.69, one hundred and seventy-six intervening petitions had been filed in the cause by the creditors of the insolvent corporation which made the motion to discharge and to have the entire property returned to such insolvent.

Is it possible that a court of equity will do this?

The indebtedness so represented by the intervening creditors was shown, prior to said 18th December, 1883, to amount to thirteen hundred thousand dollars.

At the time these intervening petitions were filed, or, at latest, at the time said motion to discharge the receiver was made, the great body of these claims were unsecured—were held against said insolvent concern. The said insolvency was notorious, confessed, and utter. Such claims were held against a concern, which had totally ceased to be able to accomplish the purposes of its incorporation owing to such insolvency, and the assets and business of the concern were then disclosed to be of that peculiar description, especially demanding a receivership, which is described by this court in Florence Mining Company *v.* Brown, 124 U. S. R., 386. And, moreover, such business and assets were in a condition where a seizure thereof by a creditor, even for a small amount, would result in closing up the entire business,

prevent the execution of all unexecuted contracts, destroy the value of the plant, and thus result in damage to the creditors amounting to hundreds of thousands of dollars.

To say that, as against such intervening creditors, so filing their petitions under the order of the court, the insolvent corporation had a right, on its own motion, to dismiss the case, and also dismiss all of the said intervening petitions, merely because of some alleged defect attaching only to the case of the original complainants, at the commencement of the suit, is, we think, to state a proposition so erroneous as to render the error so plain as to be outside of the sphere of legitimate discussion.

Still we go on, and the cases we shall further cite below further show said error to be palpable.

Another view showing such position to be unsound may be stated thus:

Appellant had, up to the 24th of November, 1883, (1 R., 9 and 10,) acquiesced in the appointment of the receiver and the prosecution of the case, so far as any action of the appellant is disclosed by the Record. But in order to unjustly and fraudulently give preference to said portion of the creditors in whose favor said judgments were confessed, November 23, 1883, (1 R., 19,) the appellant, immediately after such confession, went into the court and asked it to dismiss the case (1 R., 9)—this to the end that appellant might, through the lien of such confessed judgments, give priority to the said favored creditors, and, thereby, give to the few the property of the corporation on which equity had imposed a trust for the equal benefit of all creditors.

The injustice and inequality of such a transaction is never tolerated in courts of equity.

Mr. Pomeroy, in section 407 of his Equity Jurisprudence, says:

"The following general principles may be regarded as firmly established, and of wide application:

"Whenever several persons are all entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, 'equality is equity.' In other words, if the fund is not sufficient to discharge all claims upon it in full, or if the debtor is insolvent, equity will *incline* to regard all the demands as standing upon an equal footing, and will decree a *pro-rata* distribution or payment."

And equity, in the enforcement of this "inclination," will resolve all doubts in favor of equality, will disregard all matters of mere form, (1 Daniel's Chancery, 240,) will treat plaintiffs upon the Record as defendants, and *vice versa*, (1 Daniel's Chancery, 234,) and will so shape, adjust, mold, and modify its processes and proceedings as to insure the attainment of that great end, equality, which has given to this department of the law its distinctive name—Equity.

This fundamental rule, so distinguishing the practice in courts of equity from the practice in courts of law, is expressed in section 109 of Pomeroy in the following words. He says:

"There is, in fact, no limit to their variety and application. The courts of equity have the power of *devising* their remedies, and shaping them so as to fit the changing circumstances of every case and the complex relations of all the parties."

The author concludes his discussion of the maxim that "equality is equity," by saying that the matters which he had pointed out in illustrating the application of this maxim "demonstrated the fact that a court of equity endeavored to carry the maxim into operation in the administration of remedies, whenever jurisdiction is, for any cause, obtained over the subject-matter in controversy."

We now proceed, at the risk of some repetition, and of doing unnecessary work, to present further authorities and views in support of our present point, that (even if there was irregularity in the original appointment of the receiver) there was, under the conditions existing when the motion to discharge the receiver and dismiss the bill was first made, no sufficient ground for such discharge and dismissal, nor any error in refusing these.

"The appointment or *discharge* of a receiver is, ordinarily, matter resting wholly within the discretion of the court."

Railway Co. *v.* Soutter, 2 Wall., 510 (Syllabus).

On page 521 Justice Miller announces the principle "that the appointment and discharge of the receiver are ordinarily matters of discretion in the Circuit Court, with which this court will not interfere."

Indeed, whenever the question of discharge arises, the courts are to then act with a view to the then situation of the case, and the rights and proper protection of all parties then in it.

Beach on Receivers, secs. 99, 800, 776, and 791.
High on Receivers, secs. 344, 357, 835, 841.
Wait on Insolvent Corporations, secs. 177, 272.

"The interests of the creditors are, in all cases, to be kept in view, in determining whether the receiver shall be continued or discharged. And a creditor who has, upon his own bill, obtained the appointment of a receiver, is not entitled, as of right, upon the settlement of his own debt, to have the receiver discharged when the rights of other creditors have intervened.

"In such a case, it is the right and duty of the court to protect the interests of all the creditors who may have presented their demands."

High on Receivers, sec. 357; Harrington (Mich.), 194.

And Mr. Justice Bradley, speaking of the use of a receiver, in Wallace *v.* Loomis, 97 U. S., 112, says:

"It is a part of that jurisdiction which is always exercised by the court by which it is its duty to protect and preserve the trust funds in its hands."

This principle determined Ober *v.* Gallagher, 93 U. S., 199, though the facts were not at all like these.

Beech on Receivers, section 99, lays down the rule that the receivership is to be continued, although the original reasons for the appointment have been removed, where there are new ones which have not been, or cannot be, removed.

Section 800 says the receiver is to be discharged when all parties are satisfied that there is "nothing for a receiver to act on," and "on notice to all parties."

The law of Ohio is quite similar as to the use of receivers.

In Williamson *v.* Gerloch, 41 Ohio State, 682, the receiver is said to hold for all interested, and ordered to pay to a party on whose application the appointment had formerly been refused.

"Where the appointment is intended to be for the benefit of the party only on whose motion it is made, it should be limited to the lien of that party."

But in the case at bar he was appointed generally, on application of three, bringing suit for all.

All through, Mr. Crawford assumes that he need pay no attention to any but the original complainant. Now, how is this? Irregularities of practice not objected to at the time and not subversive of justice will not be regarded on appeal.

Clements *v.* Moore, 6 Wall., 299, and cases cited below.

We believe, however, that the practice of the court below was in strict accordance with the best equity practice.

The case of the Chicago and Alton R. R. Co. *v.* Union Rolling Mill Co., 109 U. S., 702, is instructive and sensible. The complainant undertook to dismiss the bill after the Union Rolling Mill Company, a lien holder and citizen of the same State as the main defendant, had filed a cross-bill. But the case proceeded to a decree, which was sustained by the court.

Page 713, quoting Daniels' Chancery Practice:

"After a decree has been made of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor the defendant on the consent of the other can obtain an order for the dismissal of the bill."

The case cited of Connor *v.* Drake, 1 Ohio State, 170, characterizes such attempt at dismissal as trifling with the court.

It is to be noted that at the time of the attempted dismissal the Union Rolling Mill had only an issue on interlocutory order, and not a final decree.

In the case at bar all had issues or defaults on interlocutory order, and some reports finding in their favor affirmed by the court.

In Johnson *v.* Waters, 111 U. S., 640, the rule is laid down that where a creditor's bill was brought in behalf of plaintiff and such other creditors as might become parties, it was error, "in granting relief, to confine it to the creditors complaining; that *the usual and correct practice* is by means of a reference to a master to give *all valid creditors* an opportunity to come in and have the benefit of the decree." (Syllabus, pp. 641 and 674.)

So in Wiswell *v.* Sampson, 14 How., 52, it is held, that if a court is in possession of property by a receiver

it may permit any claimants, by lien or otherwise, to intervene *pro interesse suo*, and be examined before a master, and, if necessary, before a court. (P. 68.)

Daniels' Chancery Practice, there cited, (p. 65,) sanctions this practice.

Other cases are Myers *v.* Fern, 5 Wall., 205; People's Bank *v.* Calhoun, 102 U. S., Opinion 260 to 262.

The intervention, in the case at bar, was substantially the same as in *Ex-parte* Jordan, 94 U. S., 248, and, as then, an appeal was allowed to the intervening creditors; so in the case at bar an appeal has been taken by one of the petitioning creditors (The Florence Mining Co.) to this court, and the judgment of the court below in favor of the Mining Co. was affirmed in 124 U. S.

See, also, Savannah *v.* Jessop, 106 U. S., 564, where, as here, a receiver was in possession.

It is the desire and legal duty of every court having property "*in custodia legis*," in relieving itself of the trust, to avoid injustice, and not to encourage fraud.

This property has been "*in custodia legis*" for over six years, long enough for some claims to outlaw. The practical question is, what shall be done with it

For six long years creditors have not had a cent. Shall it be delivered to the insolvent corporation under the control of an insolvent president, with his million dollars of stock worth nothing, save for that control?

Shall it be handed over to the creditors, many of them real creditors, in whose favor judgments were confessed, or to another receiver for their benefit, as judgment creditors; or, shall it be sold and all creditors paid alike, as far as may be?

The last is clearly the proper end to be attained, though not the end devised by Mr. Ayer, and the corporation as controlled by him.

There is but one way to accomplish it, to wit, through this receiver.

"The usual practice is to distribute the assets of an insolvent corporation, through a receiver or assignee, appointed by the court." (Section 867, Morrowetz on Corporations, volume 2, and many cases cited.)

The case in 46 Ohio State has been already fully stated, showing the impropriety of a preference under the circumstances of this corporation.

In Bloomingdale *v.* Stein, 42 Ohio State, 168, the court below held a fraudulent confession of judgment, and levy of execution under it came within Ohio Revised Statutes, sec. 6344, and came within its language that "transfers, conveyances, or assignments made with intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor."

See 13 How., 165, where it was held to be the giving of a security.

In the case at bar, Mr. Ayer has been unable to deliver or allow possession or levy, because the property was "*in custodia legis*," but he asks the Supreme Court of the United States to do it for him.

A large result is at stake to the appellant in its control of the stock.

He will likely endeavor to dispose of the large personal assets himself, leaving the confessed judgments to collect out of the real estate, and the general creditors entirely unpaid.

Recapitulation of Principal Law Points.

What we have now gone over establishes, we think, the converse of every proposition of law submitted in the appellant's brief which has a material bearing upon the pending appeal.

1. It establishes the opposite of the proposition that this court is without jurisdiction, owing to the fact that section 723 of the Revised Statutes prohibits this suit in

equity because complainants had "plain, adequate, and complete remedy at law." The equity rule is that the remedy at law must be as plain and adequate and as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.

See Boise *v.* Grundy, 3 Pet., 210.
Watson *v.* Sutherland, 5 Wall., 74.
Payne *v.* Hook, 7 Wall., 430.
Van Wharton *v.* Morton, 99 U. S., 376.
Krippendorf *v.* Hyde, 110 U. S., 280.
Buzard *v.* Houston, 119 U. S., 352.
La Mothe *v.* Fink, 8 Bissel, 500.
De Menacho *v.* Ward, 23 Blatchf., 510.
And see the other cases on this point cited above.

2. It establishes the converse of the proposition that there is no right, in cases like the one at bar, to go into equity for the collection of a money debt until after judgment, execution, and return of *nulla bona.*

See Mellen *v.* Moline Iron Works, 131 U. S., 353–366, and cases cited at page 366, and the other cases above cited bearing on this point.

3. It establishes the converse of the proposition that the assets of this corporation, after insolvency, are not trust property, and as such subject to administration in equity.

See Mellen *v.* Moline Iron Works, 131 U. S., 366; Rouse, trustee, *supra*, and the cases there cited, and the other cases on this point cited above.

4. It establishes the converse of the proposition that the insolvent's creditors have no lien upon this property from and after the occurrence of insolvency, and after the corporation ceasing to accomplish the purposes of its incorporation.

See Case *v.* Beauregard, 101 U. S., 688, 690, and 691; Morgan County *v.* Allen, 103 U. S., 508, 509, and the cases there cited; also the cases cited in 131 U. S., 366, and the multitude of cases cited above.

5. It establishes the opposite of the proposition that courts of equity will *never* appoint receivers of the property of an insolvent corporation in the absence of a *specific* lien, or in the absence of judgment, execution, and return *nulla bona*.

See Rouse, trustee, *v.* Merchants' National Bank of Cincinnati, decided June Term, 1889, in the Supreme Court of Ohio, and reported in Vol. 22 of the Ohio Law Journal of October 7, 1889, page 220, and which will appear in the 46 Ohio State Reports. Also see the cases therein stated; and also the cases cited in 131 U. S., 366, and the other authorities cited above.

6. It establishes that in such suits in equity as the present for winding up the affairs of an insolvent corporation, a court of equity will, through masters in chancery, or otherwise, ascertain the amount of the creditors' claims, without requiring trials at law of these questions of indebtedness, and that such finding of the amount of creditors' claims by the court is not an invasion of the constitutional provision regarding trial by jury. To express this in the language of this court in Barton *v.* Barbour, 104 U. S., 132—

"This jurisdiction of a court of equity to try such issues according to its own practice is too well settled to be shaken."

Citing Rubber Co. *v.* Goodyear, 9 Wall., 788; Caywood Patent, 94 U. S., 695; Marsh *v.* Seymour, 97 U. S., 348. See also other cases on this point above cited.

7. It establishes the reverse of appellant's proposition that the non-maturity of some of the claims at the time

of filing the original bill is a fatal objection to proceeding in equity.

For this see statement of the case of National Furnace Co. *v.* Moline Iron Works, in the Circuit Court of the United States for the Northern District of Illinois, as that case is described at pages 355, 356, in 131 U. S. Also see Brassey *v.* Railroad Company, 19 Federal Reporter, 633, 669, and the other cases cited above.

Notice of Minor Technical Points in Appellant's Brief.

We now notice some of the minor and mostly technical points in appellant's brief, some of which may not be regarded as fully met by what we have above presented:

(1) Near the bottom of page 2, appellant's brief, he says there was no *other* showing than the verification of the original bill in support of its averments. This allegation is not true. (See 2 R., 8, Brown's affidavit.)

(2) Near bottom of page 3 appellant's brief alleges no leave to file supplemental bill given.

In reply to this we state, first, that appellant has no right to say so, because of the imperfections of the record, for which imperfections he is responsible, as above stated; and, second, we reply that such objection cannot be *first* made in this court; and, not being made below, is waived.

See Clements *v.* Moore, 6 Wall., 299.
Fritz *v.* Stover, 22 Wall., 203, 204.
Mason *v.* Hartford, 19 Federal Reporter, 56.
Myers *v.* Fenn, 5 Wall., 205.

(3) The same remark applies to the point made at bottom of page 3, appellant's brief, objecting to the order requiring creditors to file their claims prior to the 7th of

May, and before any answer, plea, or demurrer was due. No objection was made to such order below, and is, therefore, waived. Defendant was then fully in court by voluntary appearance; had theretofore, in order to at once secure the institution of the suit and appointment of a receiver, confessed a judgment in favor of the Negaunee Concentrating Company, and, besides this, there being jurisdiction of subject-matter, the compliance with that order on the part of the creditors could work no injury to the appellant.

(4) The point made on page 12 of appellant's brief, near bottom, that the case was the case of the complainants, and subject to their exclusive control until the time of the interlocutory decree, is not well taken for reasons stated below, paragraph No. 7 and others, and, besides, the objection is waived, not having been taken below.

See Meyers *v.* Fenn, 5 Wallace, 205.
Clements *v.* Moore, 6 Wall., 299.
Richmond *v.* Irons, 121 U. S., 27, 52.
Also, see paragraph 10, *post.*

(5) It is said, middle of page 21, appellant's brief, that those who proved up under the order of the court were all of the *same class* as mere creditors at large, without judgment, &c., &c.

This, though not material, is not true as a matter of fact. The Manufacturers and Traders' Bank of Buffalo, New York, sued on a judgment which it had obtained in the Circuit Court for the Northern District of Ohio. (See 2 R., 20, 21.)

(6) On page 23, appellant's brief, it is asserted that the highest courts of Ohio maintain the doctrine that no such bill as the present can be sustained in the absence of a judgment; and the brief cites Clark *v.* Strong, 16 Ohio, 317. This was a case wholly unlike that at bar, because

an ordinary creditor's bill. Besides this, we set down, in direct denial of this proposition of fact, the case of Rouse, Trustee, *v.* National Exchange Bank of Cincinnati, cited *supra*, and the other cases which we have cited, as to such proceedings as the present against insolvent corporations and in the equal interest of creditors.

(7) On page 25, appellant's brief, he cites, amongst others, Kilbourn *v.* Sutherland, 130 U. S., 505, and a number of other cases, to the point that chancery is without power to give decrees which are mere "judgments at law."

This case and many others which we have referred to are directly *against* this contention, if the contention means that, where equity has jurisdiction to administer an insolvent corporation's affairs, there is no power to ascertain the amount of debts owing, by the corporation, to the respective creditors.

In a case relied on in the opposing brief, to wit, Richmond *v.* Irons, 121 U. S., 52, cited at page 27 of such opposing brief, the court states, speaking in regard to *proving up claims in favor of intervening creditors*, as follows:

"When any creditor appeared, during the progress of the cause, to set up and establish his claim, it was necessary for him to prove that at the time of filing the bill he was a creditor of the bank; any defense which existed at that time to his claim, either to diminish or defeat it, might be interposed either before the master or on the hearing to the court. The creditor having established his claim, became entitled to the benefit of the proceeding *as virtually a party complainant from the beginning*, and the time that had elapsed from the filing of the bill to the proof of his claim would not be counted as a part of the time relied on to bar the creditor's right to sue the stockholders. In other words, if he proves himself to be a creditor with a valid claim against the bank, he *becomes a complainant by relation to the time of the filing of the bill.*"

This quotation, then, defeats *two* propositions made in the early parts of the opposing brief: One, that, in such

a case as this, chancery has not jurisdiction to perform the functions of a jury in ascertaining and rendering judgment for the creditor's claim; the other, that it is not true, up to the time of decree, that the original complainants continue to be "masters of the suit," and can dismiss or control it, even after intervening creditors have filed their claims. Such intervenors become parties to the case, as complainants, from the time of filing their petition, and, by relation, have the benefit accruing from the filing of the original bill to which they become intervenors, as if parties thereto.

(8) On page 31 of opposing brief it says that Ohio has enacted no statute which enables such a suit as the present to be prosecuted.

To this we reply by referring the court to the two cases, and the legislation of Ohio therein named, which we have above cited, to wit, Rouse, Trustee, *v.* Merchants' National Bank of Cincinnati, 46 Ohio State, and Barbour *v.* National Exchange Bank, 45 Ohio, 133, which show the fact to be the opposite of that here asserted.

(9) On page 35 of opposing brief, and other pages, it is insisted that, at the time original bill was filed, the insolvency was not established; that there was, by defendant, no suspension of business, and that there was not "insolvency," in fact, in the legal sense of that word.

To this it is to be replied, first, that the Supreme Court of Ohio has decided that one is "insolvent," within the sense of such word in the bankrupt law, "when he is not in a condition to pay his debts in the usual and ordinary course of business.".

In support of this the court quotes Shone *v.* Lucs, 3 Dowling and Ryland, 218 (16 English Common Law Rep., 166), and, also, Herrick *v.* Borst, 4 Hill's New York Rep., 650.

This court has given the same definition of insolvency in Cunningham *v.* Norton, 125 U. S., 690, where the court says:

"When a person is unable to pay his debts he is understood to be insolvent. It is difficult to give a more accurate definition of insolvency."

In Merchants' National Bank *v.* Cook, 95 U. S., 346, the same definition, in substance, is again repeated by this court. The court there says:

"When the condition of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe. (Toof *v.* Martin, 13 Wall., 40; Buchanan *v.* Smith, 16 *Id.*, 277; Wagner *v.* Hall, *Id.*, 584.)"

The other answer to this contention that insolvency was not established at the date of filing this bill and making the order for receiver and the order for creditors to intervene, &c., is that the insolvency was admitted by the defendant by his said confession of judgment in favor of the Negaunee Company, and also by the defendant never filing an answer. And this fact of no answer being filed is a conclusive reply to many *other* propositions in the opposing brief. For example, it is a reply to all that is said about there being *no evidence* in the Record justifying the judgments that were rendered in favor of the creditors; that no testimony was taken by the master, &c., showing the amount due the creditors, and the like.

The proof of any and every fact, which is properly pleaded, in a declaration, or in a bill in equity, is dispensed with, and the properly-pleaded fact *is admitted*, in case of default in making plea, or in making an answer.

In the case of Hogan *v.* Ross, 13 Howard, 173, this court held that where a set of pleas are all applicable to the *first count*, which first count was stricken out after the issues thereon were made up, and the second count was *not answered*, it was regular to give judgment for the plaintiff for want of plea; and the court there held that the judgment for the amount well pleaded in the counts, not met by any traverse, was properly entered without proof.

The same thing is repeated in Chapman *v.* Barney, 129 U. S., 677, 680, holding that, in case of default, it is proper to take judgment as upon a *confession* by the defendant that the amount charged in the declaration was due; and that where there is an appearance and no plea, and the declaration remains without any answer, it is error to call a jury and enter a verdict, unless for the mere assessment of damages. In the opinion the court says:

"Where there has been an appearance and no plea, * * * the declaration remains without an answer, and the plaintiff may move for a judgment for want of plea, as upon *nil dicit*."

And in an equity case, (Thompson *v.* Wooster, 114 U. S., 110,) the same doctrine is repeated as applied in equity.

The court says:

"The defendants are concluded by that decree, so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants, unless it is shown to be erroneous by other statements contained in the bill itself. A *confession* of facts properly *pleaded dispenses with proofs of those facts, and is as effective for the purposes of the suit as if the facts were proved;* and a decree *pro confesso* regards the statements of the bill as confessed."

The whole subject is here elaborately examined in the light of the English and American cases by Justice Bradley.

In the head-note the rule is stated thus:

"After entry of a decree *pro confesso* and while it stands unrevoked, the defendant cannot set up anything in opposition to it, either below, or in this court on appeal, except what appears on the face of the bill."

This, therefore, thoroughly disposes of all that is said in the opposing brief about insolvency not being proved, and about there being no proof establishing the amounts of the claims of the various creditors, and, also, about any and every other fact well pleaded in the original and supplemental bills, or in the intervening petitions where no traverse was put in by the defendants. Besides this, as to the matter of insolvency, it was affirmatively found by the decree as existing at the date of the filing of the original bill, February 20, 1883. (See 1 R., 38.) Indeed it was, from the start, notorious, utter, and confessed.

(10) On page 38, appellant's brief, the point is made that the supplemental bill, changing the whole scope of the case, was filed without leave and without notice to appellant; and to this is cited Shaw *v.* Bill, 95 U. S., 10.

This is one of the points as to which the appellant is not entitled to say that this bill was filed without leave, &c., and that there was no notice and no rule. This is so because he is, as above explained, in fault for the fact that the *entire* record is not here. But aside from this, the failure to get leave, if that were the fact, is waived by not being taken below. (See 6 Wallace, 299, cited *supra*, and the other cases cited in this paragraph below.

Besides this, in the case cited to this point by the opposing brief, of Shaw *v.* Bill, 95 U. S., 10, the court (on p. 14) uses the following language regarding the failure to serve the notice of supplemental bill:

"The fact that process of subpœna was not issued upon the supplemental bill *is of no consequence.* Such process is only necessary where *new parties are brought in. The supplemental bill is a mere adjunct to the original bill, and where the parties have already been served, no further subpœna for them is required.*"

And again: The defendant, after entering voluntary appearance, and thus putting himself for all time in court in that case, became bound to *notice* every pleading and step in the case. He came into court and filed, on the 24th of November, 1883, two pleas (set forth 1 R., 9) to the *original and the supplemental bills*, and thus waived any irregularity regarding leave to file the bills, and in regard to notice thereof, had such irregularity intervened, as it, in fact, had not.

Since there is quite a variety of points urged in the opposing brief as grounds for the reversal of the decree below, and which cannot be legitimately urged for reversal here in contravention of the general rule, that questions not made on the trial or presented to the court below for decision cannot be entertained here when they do not go to jurisdiction of the subject-matter, and are not of a kind that would be good on a motion in arrest of judgment after verdict, it will not be amiss to here present some specimens of the adjudications of this court as to the kind of objections to the action of the court below which are waived under the operation of this general rule.

We do this in this connection because we desire to revert to this paragraph 10 repeatedly in noticing the objections urged by appellant which come under this rule of waiver.

The following matters, assigned in this court as error in the court below, have been determined by this court, in the cases named below, to have been *waived*, and not

to be available in this court, because not presented below:

The *form* of the action. (2 Wall., 252.)

Non-joinder of parties not indispensable. (1 Peters, 299; 15 How., 546; 92 U. S., 171; *Id.*, 116; 99 U. S., 567.)

That petition for removal was not *verified by oath.* (Pacific Railroad Removal Cases, 115 U. S., 17.)

Delay or default in filing petition. (113 U. S., 594.)

As a general rule, an objection to matters which were not brought to the attention of the court below will not be considered here. (105 U. S., 4.)

Objecting to *form of authentication* of a deed put in evidence when objection below was *only* on account of irrelevancy. (104 U. S., 786.)

Objection to admissibility in evidence of a deed on the ground that it refers to act of *March 30* instead of *June 30,* when that objection as to its reference was not made below. (Springer *v.* U. S., 102 U. S., 586.)

General rule again reasserted that an objection not taken in court below cannot be considered here. (102 U. S., 572.)

That a national-bank tax is void because greater than State tax. (9 Wall., 363.)

Statute of Limitations. (105 U. S., 640, 644; 109 U. S., 185.)

Defense of usury. (7 Wall., 499.)

Objection to want of proof of a fact which, *if taken at trial, might have been met at once, must be taken below, or it will be considered as waived, except as to matters going to jurisdiction. (116 U. S., 418, 420.) To this we call particular attention, as it applies to many of appellant's points raised.*

Insufficiency of replication to put averments of plea on proof. (14 Wall., 613.)

That there was no replication. (22 Wall., 198; 7 Wall., 565; 104 U. S., 54, 77; 97 U. S., 389.)

That the allegations of fact set forth in a libel were not sufficient to support a decree. (14 Wall., 258, 265.) This decision is applicable to several of appellant's points.

Questions as to sufficiency of information and regularity of proceedings in an internal revenue forfeiture proceeding. (116 U. S., 436, 442.)

Objections *waived below* cannot be raised on appeal. (114 U. S., 576.)

Consent given below cannot be withdrawn here. (103 U. S., 516.)

Mere irregularities waived if not raised below. (11 Peters, 80.)

Exceptions not taken in court below to a master's report not heard in this court. (103 U. S., 90; 1 Black., 506; 101 U. S., 633; 6 Wall., 225; 6 Wall., 561; 18 How., 295; *Id.*, 289; *Id.*, 507; *Id.*, 530; 5 How., 83.)

(11) Point made, page 42, appellant's brief, asserting that the supplemental bill must be ignored, and regarding the necessity of *confining* the decree to matters embraced by the original bill, this owing to the fact that the supplemental bill was, as alleged, filed without leave and without notice, is answered by what we have cited in the preceding paragraph 10.

(12) The same propositions stated in paragraph 10 answer what is said on page 43 about defendant not being in court as to supplemental bill, and about default being entered thereon.

(13) The point made on page 47 of appellant's brief, in regard to the consequence of no notice being given to the appellant of the filing of the creditor's claims, and that there is no recital of the existence of any such notice in any decretal order, or in the master's report, and that

to sustain the default decrees in favor of the creditors, it is essential that the record should show the existence of jurisdiction by embodying the process, &c., is abundantly met by the propositions stated above in paragraph 10. It is further met by the fact that the defendant, Brown, Bonnell & Co., by voluntary appearance, was in court on and ever after the 20th of February, 1883, and being so in court, was bound to take notice of every step taken in the case to which they were thus parties.

In the case of Walden *v.* Craig, 14 Peters, 47, the court held that—

"Where process had been served and a party was in court, there the party must take notice of every decision upon every collateral question in the case where they are so in court. And even *after* judgment in ejectment the parties are still in court for the purpose of giving effect to the judgment; and as the court had power to extend the demise after judgment, the defendant must be considered as in court on a motion to amend as well as on any other motion or order which may be necessary to carry into effect the judgment."

Besides this, in this case of Walden *v.* Craig, regarding the question whether notice had or had not been served, the court says (bottom of page 154):

"If they were necessary, notices in the case under consideration might well be *presumed, for it does not follow that no notices were given because none appear upon the record.* The fact of notice may be proved by parol. But, however convenient in practice, and, indeed, necessary, to some extent, to preserve from prejudice the rights of parties, notice in such cases may be, still it is a question of practice. It does not go, except under positive rule, to the exercise of power of amendment by the court."

Were it necessary to apply the law here stated in this quotation, (as it is not, because the parties, being in court, were bound to take notice of intervening petitions,) how readily will the court apply it in the present case,

because of the fact, above explained, that, owing to the dereliction of appellant, this record is not a full record of what happened in the court below?

And the same thing is impliedly held by this court in Smith *v.* Wollfalk, 115 U. S., 143, where the court held that, *upon and after a final decree* settling the rights of the parties, creditors, &c., and *disposing of the whole cause of action*, then (and after such final decree) one of the complainants could not, without a new notice, re-open it for the purpose of obtaining relief in that suit against a co-complainant.

All through this case it was taken for granted, as a matter of admitted law, that, before such final decree, any such step could be taken without new notice to the defendant.

(14) In regard to point made at bottom of page 49, appellant's brief, that the petitions are shown to be unsworn to, by the fact that the petition of the Greenville National Bank, named in the stipulation, (2 R., 1,) and which is found in 2 R., 252, 253, is sworn to before a notary public, and is stipulated to be like those of the other intervening petitions, and that a notary public is not authorized to administer oaths, we reply—

First. That if that were an objection, it was waived by not being taken in the court below. (See authorities cited in paragraph 10; especially see Pacific Removal Cases, 115 U. S., 117; 14 Wall., 613; 22 Wall., 198; 7 Wall., 565; 104 U. S., 54; 97 U. S., 389.)

Second. That the stipulation does not say that the other petitions were, in respect to this jurat, like that of the Greenville National Bank; but only says that the other petitions were of the "*general* character" of that petition.

Third. That the cases cited, page 49, opposing brief, from 107 U. S., 671, and 131 U. S., 50, were each *criminal* cases; that of United States *v.* Hall was for perjury, in making a false affidavit as to his services as deputy surveyor; that against Curtis was against him as an officer of a national bank for a false report, made under section 5211 of the Revised Statutes. And the affidavit in each of those cases was made before a notary public; and the question was, whether the oath on which the indictment was framed was extra-judicial, because not taken before an officer authorized to administer such oaths. They were cases, therefore, where *no waiver* could be made by failing to make the objection in the court below, for the reason that the objection went to the very matter of the *existence* of the alleged crime.

Fourth. We submit that the notary had power to administer the oath in this case, because, (*a*) by the laws of Ohio he has power to administer oaths in *all* cases where oaths are required or authorized to be administered in the State of Ohio, including, of course, all jurats required by the *practice acts of that State;* and (*b*) since these petitions of intervening petitioners were *analogous to* (although not in law such) actions at law, and as section 914 of Revised Statutes of United States directs that the practice, &c., in the courts of the United States not in equity or admiralty, shall conform as nearly as may be, to the practice, pleadings, forms, and proceedings in like cases in the courts of the States, therefore in this case the notary had power to administer the oath objected to; and

Fifth. We submit that under the laws of the United States notaries are authorized to administer these oaths.

(15) At bottom of page 49, top of page 50, opposing brief, the point is made that the creditors' claims were generally

cases of contingent liability of an indorser, and that the master based his allowance on the creditors' petition, and, therefore, the brief concludes that there was an absence of evidence which can now be made available to defeat the findings in favor of the creditors.

In reply to this it is proper to be stated—

First. That this statement that the master based his report on creditors' petition *alone* is not true as a matter of fact. In 2 R., 209, the special master states:

"In accordance with the order I caused, in each case in which the receiver made any contest as to the amounts due on the petition of the creditor, proper pleadings to be filed, and upon the issues so made I have heard such testimony as the parties produced, and made in every case a special report as to the amount allowed, with reasons for such finding."

Second. But aside from this, if this were a valid objection, it has been waived by not being taken advantage of below. And, moreover, there was by appellant, so far as we have observed, no exception to the master's report as to this matter; no pleading was, by appellant, interposed denying the petition of the creditor, or the liability of Brown, Bonnell & Co. For these and the other reasons stated in paragraph 10, *supra*, this objection cannot, we submit, be sustained.

(16) On page 52, Conn. *v.* Penn., 5 Wheat., 424, and section 698 of the Revised Statutes, are relied on to show that the duty of bringing a perfect record here, in the case of this appeal, is put, by said section and decision, upon appellee.

Nothing of the kind appears, either in the decision of Conn. *v.* Penn., nor in Bales *v.* Garlington, 92 U. S., 1, (where the case in 5th Wheat. is reviewed,) nor in said section 698. Neither of these hint at the idea that

appellee, instead of appellant, shall see to the filing of the record, or to its being perfect.

Authorities are referred to for the purpose of showing that the proofs contained in the present record do not support the decree.

There are many conclusive replies to this position. One is, that all the averments of the bill and supplemental bill are admitted to be true by the failure to answer. This court, in Cavander *v.* Cavender, 114 U. S., 471, says:

"Courts of equity are frequently required to act on the *admissions of the answer without other proof.* Thus, when a cause is heard upon plea and answer, the decree is based entirely upon the *admissions of the answer without other testimony.*"

Citing Reynolds *v.* Crawfordsville Bank, 112 U. S., 405; Brinkerhoff *v.* Brown, 7 Johnson's Chy., 217; Grosvenor *v.* Cartwright, 2 Cas. Ch., 21; Perkins *v.* Nichols, 11 Allen, 542.

If it be true, as here held by this court, that matters in a bill not denied by an answer are *admitted to be true*, it is, therefore, *a fortiori* true that a *total failure to make answer* admits all that is averred in the bill.

Again: In the "Vaughan," and the "Telegraph," 14 Wall., 265, it was insisted in this court that the libel was *insufficient to support the decree*, because the facts on which the imputation of fault was founded were not set forth, and because a libel against both vessels jointly could not be maintained. The exceptions were overruled, and in regard to this feature of the case this court (bottom p. 25) says:

"The appeals found in the record are wholly *silent* as to these exceptions. It does not appear that they were *brought to the attention of the Circuit Court*, or that it took any action whatever upon the subject. The appeals from

the Circuit Court to this court are confined to the merits of the case. Neither of them contains any reference expressly or by implication to the exceptions. *Under these circumstances they must be held to have been conclusively waived by the respondents.* To consider them here would be to exercise the appellate power of this tribunal in reviewing the action, not of the Circuit Court, but of the District Court. This we have no power to do. The exception, therefore, must be laid out of view."

If, therefore, it were true that the bill and the supplemental bill were insufficient in averment, and that the proofs in the record would not support the decree rendered, yet this objection could not be, for the first time, made here.

Again: We have, by authorities already cited, shown that the bill and the supplemental bill are both properly before this court, and that any objection to the supplemental bill that it was filed without leave is waived. And without now going into detail on the point that they are sufficient to give the court jurisdiction, and to support the decree, we submit that they are abundantly sufficient; as was, in effect, held by this court in Florence Mining Co. *v.* Brown, 124 U. S., 385, 386, where this court repeats the averments of the bill and the supplemental bill, *for the evident purpose of showing the jurisdiction of the court, the sufficiency of the bill to give jurisdiction in equity, and furnish the basis for affirming the judgment below in favor of the Florence Mining Co.*

The court will find that the petition on which the Florence Mining Company recovered below a judgment of $61,715, (1 R., 40,) is set forth in full in the Record, (2 R., 15–17,) and that it contains all the alleged defects as to its being sworn to before a notary, as to the averments regarding place, &c., of demand of payment to charge indorsee, &c., as are found in the pleadings criticised in appellant's brief. And yet on that petition this court ordered a judgment to be entered.

(17) On page 53, the opposing brief objects that "money judgments" amounting to $1,300,000, were taken without proper pleadings, notice, or proof.

In the first place, the findings by a court of equity of the amount due creditors in a case like this are not, in the proper sense of the words, "money judgments" at all. On them nowhere is the issuing execution authorized or directed; nor was it requisite. The decree of the court is a decree in the usual form prevailing both in the State of Ohio and in the courts of the United States. It is one finding the indebtedness to each creditor, (1 R., 38,) decreeing the amount to be paid by defendant, the time thereof, (1 R., 50,) and in default of payment, then the sale of the trust property as an entirety.

Under this head the point is also made by appellant that the petitions on the indorsed paper are insufficient in law to sustain a decree. In 2 R., 252, 253, is found the petition of the Lake Superior Iron Co. *et al.*, which, by stipulation, (2 R., 1,) is agreed to be of the "general character" of all intervening petitions; and its averments in regard to making the indorser liable are in these words, after describing the indorsed paper:

"And indorsed by Brown, Bonnell & Co., which was duly presented at said Union National Bank, on the 22d of March, 1883, and payment having been refused, was duly protested against the said makers and indorsers, protest fees being paid by us, $2.58."

This averment, we submit, is quite sufficient, especially in the absence of all objection thereto by the defendant.

Again: We have already quoted from the master's report his statement of the course he took in regard to trials of creditors' claims where the receiver made any question, (see 2 R., 208, and 209,) the substance of which is, that in all such cases proper pleadings were required to be filed, and upon issues, so made, he heard testimony such as the parties produced, &c., and in

every such case made special report as to the amount allowed, with the reasons.

What has been already stated under other heads, as, for example, in paragraph 10, furnishes further answers to this contention found at the bottom of page 53, opposing brief.

(18) Page 54, opposing brief, objection is made in regard to compounding the interest. The answer to this is, that there was no such compounding. The interest was not computed a second time to February 23, 1886, this being the date of the decree, but the sums found due June 1, 1884, (the date of the master's report,) bore simple interest from that time forward.

If the amounts due had been figured to February 23, 1886, the date of the decree, at simple interest, as Mr. Crawford thinks they should have been, and the principal and interest from that date became a new principal, the amount of the decreed debt, with interest, would be larger than it is made as treated by the master and by the court below.

On a debt, say, of $10,000, figured at simple 6 per cent. interest from February 20, 1883, (the date of original bill filed), to June 1, 1884, (date of the master's report of findings,) the amount then would be $10,766.66; the amount January 1, 1890, would be $14,373.49.

The same $10,000, figured with simple interest from February 20, 1883, (date of suit commenced,) to February 23, 1886, the date of the decree, (1 R., 52,) would then be $11,800, and interest on said $11,800 to January 1, 1890, would then make $14,533.66, leaving a balance of $160.17 in favor of Brown, Bonnell & Co., as decreed, rather than would result under the plan of computation advocated by Mr. Crawford.

(19) On page 57 point is made that the sale ordered in this case was not carried forward as required by the Ohio

statutes, but that the order was to sell the property in one parcel without division.

The answer to this is, that these statutes have no application to the case, as they apply to executions at law, and not to decrees in equity for the sale of the property of an insolvent corporation, subjected, by the rules of equity, to a trust for creditors, and decreed to be sold for the benefit of such creditors.

(20) The same remark is applicable to what is stated on page 58, under head (6), that the sale was contrary to equity practice, and, also, to the Ohio statutes; and that the decree erroneously ordered the sale of appellant's real estate before its personal property was exhausted.

Even if the courts of the United States were obliged to follow the practice established by the Ohio statutes, yet this point would not be well taken, because no Ohio statutes prescribe the method of selling such properties as the present under a decree in equity, making sale of the entire plant as a unit and as trust property for the benefit of creditors. For example, in every case where a railroad property is sold in Ohio, it is sold with all the personal property, cars, machinery, tools, or other appliances that belong to it as a plant. This is demanded by obvious reasons, the property being by its nature, its purposes, and its use made a unit.

(21) Section 5383, Revised Statutes of Ohio, referred to on page 59, opposing brief, has no application to the case, but is simply a direction to the sheriff as to how he shall proceed in an ordinary execution on a judgment at law. And for the reasons already stated it has no application to the decree of sale in the present case made by a court of equity of the United States of the peculiar property called a "plant" or a unit so belonging to an insolvent corporation, and being sold for the benefit of creditors.

(22) It is not true as stated, page 60, opposing brief, that the decree in the present case *stops* by directing that the sale should be made "as on a judgment at law;" but its words are words (1 R., fol. 103) directing the special master "to cause the real and personal property herein described * * * to be appraised, advertised, and sold as upon judgment at law, *and to sell the same in one parcel without division, and to make report to this court of such sale for confirmation.*"

(23) On page 63, appellant's brief, it cites Gormeley *v.* Potter, 29 Ohio State, 597, as proving and establishing the rule that where equity has removed the impediment to a sale by execution at law, there the sale must be made as upon execution.

The case maintains no such doctrine as one applicable to a case like the present, where the proceeding is not one in aid of an execution levied on a judgment at law, but is the assertion of the equitable powers of the courts of the United States (and of the State) to enforce, as against the property of an insolvent corporation, which has ceased to accomplish the purposes of its creation, that equality of payment out of the assets of the corporation which results from the property having become trust property, owing to said insolvency.

The first paragraph of the syllabus in this case in 29 Ohio State reads as follows:

"Where an execution is levied on land, and which has been conveyed by the judgment debtor, with intent to defraud his creditors, the judgment creditor may maintain an action to set aside the fraudulent conveyance, in order to effect a better sale of the property."

This paragraph is sufficient to indicate the full and exact scope of the decision, so far as it relates to the present point.

(24) On page 67, opposing brief, it is asserted that *no Court in Ohio*, neither *nisi prius* nor appeal, has *ever* asserted the existence of such visitorial power over corporations as to attempt to ascertain the debts and settle the affairs of insolvent corporations, or asserting that the Federal courts have power to administer any such "winding-up laws" of the States.

In reply to this proposition it is enough to set against it the law as laid down in the case of Barbour *v.* National Exchange Bank, 45 Ohio State, 133, and Rouse, Trustee, *v.* Merchants' National Bank of Cincinnati, 56 Ohio State, p. .

(25) On page 68, opposing brief, the case of Clark *v.* Smith, 13 Peters, 195, is insisted as establishing the point that the remedies in the courts of equity of the United States must be held in subjection to the restriction that they cannot adopt proceedings different from those which prevail, in equity, in England, although such modification of the English practice in equity may be required to be adopted, in the Federal courts, in order to secure to citizens those *new rights* created by local statutes.

That this proposition is utterly unsound, so far as it relates to the Federal courts being deprived of powers to adapt their equity practice so as to administer and enforce new rights created by State laws, is abundantly established by the authorities we have above cited; as, for example, as is laid down in 1st Pomeroy's Equity, sec. 297 and note 1, on page 330; and also in the cases which we have above cited, found in 13 Wall., 287; 103 U. S., 11; 109 U. S., 497; 105 U. S., 647; 21 Wall., 520; 13 Wall., 243; 110 U. S., 24; 112 U. S., 410; 118 U. S., 89; 30 Federal Reporter, 885; 29 Federal Reporter, 476; 28 Federal Reporter, 680.

Besides this, the case of Clark *v.* Smith, 13 Peters, 195, contains no such doctrine as deprives the courts of the

United States from adopting the local equity practice prescribed by State statutes, where that can be appropriately done.

What the case rules on this point is substantially indicated in paragraph 5 of the syllabus, which reads as follows:

"The State legislatures have, certainly, no authority to prescribe the forms or mode of proceeding in the courts of the United States; *but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the same courts.* On the contrary, propriety and convenience suggest that the practice should not materially differ when titles to land are the subjects of investigation."

(26) At page 71, opposing brief, there is a *purported* quotation from the case of Freedman's Bank *v.* Earl, 110 U. S., 710, to the effect that courts of equity do not secure equality as between creditors of a corporation when the corporation is in full life.

That is not an accurate quotation of anything found in said case at 110 U. S., 710; nor is there anything in this case in 110 U. S. which is in conflict with the law as laid down by this court in Mellen *v.* Moline Iron Works, 131 U. S., 366, which we have already repeatedly quoted, in which the court, quoting from Graham *v.* R. R. Co. 102 U. S., 161, says:

"When a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

We have now gone over, with what we regard as un-

necessary fullness the minor and technical points made in appellant's brief.

The truth is, that the case is ruled by the doctrines in the cases just cited, Mellen *v.* Moline Iron Works, 131 U. S., 366, and in Rouse, Trustee, *v.* Merchants' National Bank of Cincinnati, 46 Ohio State. We might safely have rested the case upon these two adjudications, according to our views of the case; but as counsel can never anticipate what the views of the court may be, they are not justified in omitting to present to the court every available argument. Hence the length of this brief.

If further discussion should be, in judgment of counsel for appellee, required on matters contained in appellant's brief, it will be reserved for oral argument.

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